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

Excise Appeal No. 995 of 2012

(Arising out of Order-in-Original No. 10/CEX/2012 dated 30.03.2012 passed by Commissioner of Central Excise, Pune-I)

M/s. Ultramix Computer Support System Pvt. Ltd. **Appellant**
Survey No. 142/1, Near Parmar Chambers,
Chinchwad, Pune

Vs.

Commissioner of CGST & CE, Pune-I **Respondent**
ICE House, 41-A, Sasson Road,
Opp. Wadia College, Pune 411 001.

WITH

Excise Appeal No. 996 of 2012

(Arising out of Order-in-Original No. 10/CEX/2012 dated 30.03.2012 passed by Commissioner of Central Excise, Pune-I)

Jayant Shirwadkar **Appellant**
Partner Excel Technologies,
Vasant Vihar,
Sneh Sadan Co-op.,
Bibwewadi, Pune 411 037.

Vs.

Commissioner of CGST & CE, Pune-I **Respondent**
ICE House, 41-A, Sasson Road,
Opp. Wadia College, Pune 411 001.

AND

Excise Appeal No. 997 of 2012

(Arising out of Order-in-Original No. 10/CEX/2012 dated 30.03.2012 passed by Commissioner of Central Excise, Pune-I)

Shrikant Shirwadkar **Appellant**
Director, Ultramix Computer Support
System Pvt. Ltd.,
168/4, Alankar Parvati,
Pune 411 009.

Vs.

Commissioner of CGST & CE, Pune-I **Respondent**
ICE House, 41-A, Sasson Road,
Opp. Wadia College, Pune 411 001.

Appearance:

Shri Rajesh Ostwal, Advocate, for the Appellant
Shri N.N. Prabhudesai, Superintendent, Authorised Representative for the Respondent

CORAM:

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

Date of Hearing: 21.07.2022
Date of Decision: 30.09.2022

FINAL ORDER NO. A/85920-85922/2022

PER: SANJIV SRIVASTAVA

These appeals are directed Order in Original No 10/CEX/2012 dated 30.03.2012 of Commissioner of Central Excise, Pune. By the impugned order Commissioner has held as follows:

"ORDER

i. I confirm and demand Central Excise Duty amount of Rs. 18,00,000/- (Rs. eighteen lakh only) on clearances made by Ms Shrikant Refrigeration Company & M/s Excel Technology and order recovery of the same from M/s Ultramatix Computer Support Systems Pvt. Ltd. under the provisions of Sec.11A of Central Excise Act, 1944 as proposed vide SCN F.No. V(8415)15-204/Adj/99 dtd. 22.09.1999.

ii. I order that the duty demanded to the tune of Rs.18,44,400/- in Annexure B to the SCN F. No. V (8415)15-204/Adj/99 dtd. 22.09.1999 does not survive for confirmation.

iii. I impose penalty of Rs.2,00,000/-(Rs. Two lakh only) under Rule 173Q of the Rules on M/s Ultramatix Computer Support System Pvt. Ltd.

iv. I impose personal penalty of

a. Rs.1,00,000/-(Rs. One lakh only) under Rule 209A of the Rules on Shri. Shirwadkar, Director of M/s Ultramatix Computer Support System.

b. Rs. 50,000/-(Rs. Fifty thousand only) under Rule 209A on Shri. Jayant Shirwadkar, partner of M/s Ultramatix Computer Support System Pvt. Ltd.

v. I order confiscation of land, building plant and machinery, material belonging to M/s Ultramatix Computer Support System Pvt. Ltd. under Rule 173Q(1) of the Rules. However I give option of payment of redemption fine of Rs. 10.00.000 only) in *lieu of the said confiscation to M/s Utramatix Computer Support Systems Pvt. Ltd.*

This order is issued without prejudice to any other action that may be taken under this Act or any other Act for the time being in force within India."

1.2 For ease of reference we refer the appellant in Appeal No E/995/2012 as Appellant 1, in Appeal No E/996/2012 as Appellant 2 and in Appeal No E/997/2012 as Appellant 3.

2.1 Appellant 1 is engaged in the manufacture of Split Air conditioners falling, under Ch. Heading 8512 of Central Excise Tariff Act, 1985.The goods manufactured by the assessee are supplied mainly to DOT, MTNL & AIR.

2.2 On the basis of intelligence gathered by the departmental officers, that the Appellant had floated two dummy units viz. M/s Shrikant Refrigeration Co. (in short SRC) and M/s Excel Technology (in short ET) at the same premises, the factory premises of the assessee was visited and statements of certain persons were recorded as part of investigations. It appeared that the assessee had floated the dummy units with intent to avail inadmissible exemption and benefit of Notifn.75/87 dtd. 1.3.1987. It further appeared that

a. All the three units had common machinery and labour force
b. Common muster roll to all the three units
c. Use of label of M/s Ultramatix on the goods manufactured by other two units and
d. All the three units had common manufacturing premises.

2.3 Hence, a Show Cause Notice dated 22.09.1999 was issued to the Appellants alleging therein the contraventions of following Rules of erstwhile Central Excise Rules, 1944 (in short the Rules):

a. Rule 9(1) of the C. Excise Rules in as much as they failed to pay appropriate Central Excise Duty on full air conditioners in split form for the period from Sept.1994 to March 1995.
b. Rule 173(C) read with Rule 173F of the Rules in as much as they failed to determine the correct duty liability on the

goods i.e. air conditioner in split/package form cleared by them.

c. Rule 173B of the Rules in as much as aforesaid two companies floated by the assessee as dummy units, availed SSI exemption under Notification No. 75/87 dtd.01.03.1987.

2.4 The show cause notice ask the appellants to show cause as to why:

a. Central Excise duty amounting to Rs. 18,44,400/- at full rate of 60% should not be recovered from the assessee in respect of split air conditioners cleared under the guise of parts and accessories @30%
b. The clearance of M/s Ultramatix and clearances shown against the two dummy units viz. M/s Shrikant Refrigeration Co and M/s Excel Technologies should not be clubbed together on the basis of invoices issued by the said two dummy units and recover Central Excise duty of Rs. 19,35,000/-
c. Total duty amounting to Rs 37,79,400/- (Rs 18,44,400 + Rs 19,35,000) should not be demanded and recovered from them by invoking Proviso to section 11 A (1) of Central Excise Act, 1944 read with rule 9 (2) of the Central excise Rules, 1944.
d. Interest @20% should not be recovered from them under Sec.11AB of the Act
e. Penalty should not be imposed on Appellant 1 under Sec. 11AC of the Act
f. Penalty should not be imposed on Appellant 1 under 173Q of the Rules.
g. Penalty should not be imposed on Shri. Shrikant Shirwadkar and Smt. H.S.Shirwadkar, Directors of UCSSPL; Smt. H.S.Shirwadkar Partner of the dummy unit viz. M/s Shrikant Refrigeration Co. and Shri. Jayant Shirwadkar, Partner in the other dummy company viz. M/s Excel Technologies (in short ET), under Rule 209A of the Rules.
h. Land, building, plant, machinery, material etc. should not be confiscated under Rule 173Q(2) of the Rules.

2.5 Further para 5 of the show Cause Notice stated as follows:

"5. And Shri Shrikant Shirwadkar, Director of M/s UCSSPL., Shri Jayant Shirwadkar, Partner of the said dummy unit i.e. M/s Excel Technology and Mrs H S Shirwadkar, Director of M/s UCSSPL & Partner of the said floated unit i.e. M/s Shrikant Refrigeration Co are hereby called upon to show cause to the same authority within thirty days of the receipt of this notice as to why personal penalty should not be imposed on them under the provision of Rule 209A of the Rules.

2.6 The SCN was adjudicated vide Order in Original NO.42/CEX/2001 dtd. 09.01.2002. recording findings as follows:

i) The extended period was not invokable so far as the clearances of M/s Ultramatix Computer Support System were considered, since the classification list w.e.f 1994 was finally approved by the jurisdictional Asstt. Commissioner, holding therein that the goods manufactured by M/s Ultramatix were classifiable under Chapters sub heading 8415.00 as parts attracting duty @30%.

ii) From the admittance by various partners/ employees of the companies, it was concluded that both M/s SRC and M/s EL were the units floated by the assessee as a temporary measure for catering to their requirements of execution of the pending orders and accordingly the clearances made by these three units were to be clubbed.

iii) From the evidence on record it was concluded that all the three units viz. M/s UCSSL, M/s SRC and M/s ET, cleared 14 number of complete AC system during the period under consideration and not parts of AC as claimed by the assessee. This fact was admitted by the Partners/ Directors in the statements recorded by the officers of the department. As such, the demand to the extent of clearances of AC units was sustainable for the extended period.

2.7 On the basis of above findings order in original –

- dropped the proposed duty demand of Rs. 18,44,400/- demanded on clearances effected by M/s UCSSPL during the period covered in the classification list finally approved by the jurisdictional Asstt. Commissioner.

- confirmed the demand of Rs. 18,00,000 being duty on the combined clearances of 14 AC systems, manufactured and cleared in tandem by the three units under Sec.11A of the Act read with Rule 9(2) of the Rules.
- imposed penalty of Rs. 1,80,000/- under Rule 1730 of the Rules on M/s UCSSPL;
- Personal Penalty of Rs.50,000/- on the Shri. Shrikant Shirwadkar, Director of M/s UCSSPL under Rule 209A of the Rules
- ordered for the confiscation of plant, machinery, material etc. of M/s UCSSPL under Rule 173Q(1) of the Rules, which was ordered to be released on RF of Rs. 50,000/- in lieu of confiscation.

2.8 Aggrieved by the aforesaid Order in Original, M/s UCSSPL filed an appeal with the Hon'ble CESTAT which was decided vide order No. A/387-388/WZB/2006/C-IV/EB dtd.20.02.2006, remanding the matter for de-novo adjudication with the following observations:

"2. The impugned order passed by Adjudicating Commissioner has confirmed part of the duty demand of Rs 18.00 Lakhs (Rupees Eighteen Lakhs only) by holding that even though all the three units are registered for the same premises, the clearances are required to be clubbed for determining the exemption limit and duty liability. We find that the Adjudicating Authority has wrongly referred to Notification No.1/93-CE dated 28.02.2003fwhich is not applicable to the impugned goods) instead of considering exemption Notification No.75/87-CE dated 01.03.1997. The Adjudicating Commissioner has also dropped part of the demand relating to the allegation of clearance of Air conditioners as parts as time barred.

3. We find inconsistency in the impugned order as he has held one part of the demand as time barred whereas he has confirmed duty demand for the other part. We also find that the Show-Cause-Notice was issued under provisions of Section 11A of the Act read with erstwhile Rule 9 (2) of the Central Excise Rules, 1944 while assessments over provisional and we do not *find any reference to the final assessment in the order. It is surprising that while deciding whether the demand is time barred or not, the Adjudicating Commissioner has not checked the fact whether the assessments were provisional.*

4. We also find that the Excise Authorities have issued 3 Registrations for 3 different applicants in respect of the same premises. No action appears to have been taken against such irregularity. In view of the inconsistencies and lacunae in the impugned order, we set aside the same and remand the matter for fresh adjudication to the lower authority who shall re-decide the matter after taking into account the correct notification and also facts regarding provisional assessment and pass', fresh orders after giving an adequate opportunity of hearing to the appellants.

5. The appeals are allowed by remand."

2.8 The show cause notice in remand proceeding was adjudicated as per the impugned order referred in para 1 above. Aggrieved appellants have filed these appeals.

3.1 We have heard Shri Rajesh Ostwal, Advocate for the Appellant and Shri N.N. Prabhudesai, Superintendent, Authorized Representative for the revenue. Both the sides have also filed written submissions.

3.2 Arguing for the appellants learned counsel submit as follows:

- The impugned Order-in-Original dated 30.3.2012 places reliance on the Order-in-Original dated 8.1.2002. In fact, the impugned Order affirms the finding of the Order dated 8.1.2002. It is not possible to segregate as to how much portion of the impugned Order is influenced by the Order dated 8.1.2002. The impugned Order placed reliance on the Order dated 8.1.2022 at para 6.9 which is not in existence & is therefore liable to be set aside in its entirety.
- The Show Cause Notice in the present case has been issued to UCSSPL proposing to club clearance of SRC and ET in UCSSPL. The notice has also been issued to one partner of SRC and one partner of ET. However, there is no

Show Cause Notice issued to SRC and ET asking them as to why they are not dummy and why their turnover should not be clubbed in the turnover of UCSSPL. Non-issuance of Notice to SRC and ET vitiate the entire proceeding initiated in the present case. Kindly refer:

- Alpha Toyo Ltd. [1994 (71) ELT 689(T)]
- Ogesh Industries [1997 (94) ELT 88 (T)]
- Ramsay Pharma [2001 (127) ELT 789 (T)]
- K.R. Balachandran [2003 (151) ELT 68 (T)]
- Copier Force Vs. CCE [2008 (231) ELT 224 (T)]

➢ Show cause notice in first round of litigation was adjudicated by the order dated 8.1.2002:

- imposing penalty of Rs.1,80,000/- on the appellant 1 Rs.50,000/- on Appellant 3,
- dropped the proposal to impose penalty on Mrs. H. S. Shirwadkar, Partner of SRC and Mr. Jayant Shirwadkar (Appellant 2),
- imposed fine of Rs.50,000/- in lieu of confiscation on the appellants.

No appeal was filed by revenue against this order in appeals filed by the Appellant tribunal has vide its order dated 20.02.2006 remanded the matter to Commissioner for de novo adjudication. In the remand proceeding, the Commissioner vide impugned order imposed penalty of Rs.2,00,000/- on the appellants, Rs.1,00,000/- on Mr. Shrikant Shirwadkar, Director of the appellants and Rs.50,000/- on Mr. Jayant Shirwadkar, Partner of ET. The Commissioner also imposed fine of Rs.10,00,000/- in lieu of confiscation on the appellants.

➢ In remand proceeding cannot impose the penalty and fine beyond the amount of penalty and fine imposed in the first round of litigation. Appellants cannot be put in worse off situation merely because they filed appeal against the confirmation of demand, penalty and fine, as have been held in the following decisions:

- Jaysawal Neco [2015 (322) ELT 561 (SC)]

- Su. Jewels Exim Pvt. Ltd. [2010 (253) ELT 713 (Bom.)]
- Servo Packaging Ltd. [2016 (340) ELT 6 (Mad.).]

➢ Turnover of SRC and ET cannot be clubbed in the turnover of the Appellants, for the reason that:
  - Separate registrations granted to SRC and ET have not been revoked.
  - The Commissioner in para 6.10 of the impugned Order has held that the officer had correctly granted registration as three premises requires three registrations. If this is the contention of the Revenue, turnover of all the three units cannot be clubbed.
  - Para 7.2.1 of the impugned Order-in-Original also accept the factual position that SRC and ET were separated by a boundary wall at the time of taking excise registration. The conclusion drawn by the Revenue solely based on subsequent visit in the year on 17.2.1995 would not make the earlier separated premises as one premises.
  - provisional assessment order for all three entities have been issued recognizing their independent existence.
  - When the entities are having independent existence and independent transactions, clearances of those entities are not clubbable as have been held in following cases:
    - Jangra Engineering [2004 (177) ELT 364 (T)]
    - Nova Industries (P) Ltd. [2015 (327) ELT 103 (T)]
    - Dpk Engineers Pvt. Ltd. [2003 (157) ELT 691 (T)]
    - S.M.G. Industries [2019 (4) TMI 173 - CESTAT CHANDIGARH]

➢ Separate premises for SRC and ET and therefore clubbing of clearance is not permissible as have been held in following decisions:
  - Renu Tandon [1993 (66) ELT 375 (Raj.)]
  - Rollatainers Limited [2004 (170) ELT 257 (SC)]

  - S. C. Patel [2011 (264) ELT 414 (T)]
  - Binod Kumar Maheswari [1997 (90) ELT 83 (T).]
- The Appellant 1, M/s SRC & M/s ET are independently registered with the sales tax department and income tax department. Have independent balance sheets along with profit and loss account. In these circumstances, the clubbing of turnover is not permissible Kindly Refer:
  - Associated Engineering Projects [2019 (370) ELT 756 (T)]
  - Sree Nirmal Spinners [2014 (300) ELT 469 (T)]
  - Electro Mechanical Engg. Corpn. [2003 (152) ELT 194 (T)]
  - Noble Chlorochem Pvt. Ltd. [2020 (7) TMI 291 - CESTAT CHANDIGARH]
- The Revenue has raised contention that partners of SRC, ET and Directors of the Appellants are related and therefore the entities are relates in the present case. The above finding is contrary to the decisions as follows:
  - Kiran Biscuits & Foods [2004-TIOL-1078-CESTAST-BANG.]
  - Mars Stationary – [2017 (3) TMI 919 - CESTAT]
- Mere fact that one director of one company is also partner of other firm is not sufficient criteria to club the clearances. The clearances of different entities can be clubbed only when it is proved that all such different entities are being owned by same person. In the present case, the Directors of the appellants company is partner in SRC but the same is in their individual capacity.
  - B.S.B.K. Engineers Pvt. Ltd. [2015 (320) ELT 172 (T)]
  - JC Shah [1978 (2) ELT J317 (SC)]
  - D.S. Doors [2020 (371) ELT 863 (T)].
- The department erred in clubbing the clearance of private limited companies which are legally separate and have all through been recognized separately by the Central and State authorities. Kindly refer:
  - Circular No. 6/92 dated 29.5.1992
  - Spacetech Equipments & Structurals [2019 (8) TMI 147 – CESTAT]

- LD Industries [2003 (157) ELT 459 (T)]
- Tapsya Steels (P) Ltd. [2004 (174) ELT 108 (T)]
- NMS Babu [2006 (198) ELT 528 (T)]
- Unicure Remedies Pvt. Ltd. [2005 (185) ELT 257 (T)].

- In the present case, SRC and ET had taken the premises on rent as per the rent agreement. SRC and ET had accordingly paid the rent to the Appellants. Further, the Appellants sold the goods to MTNL and received the consideration and the said consideration was paid to SRC and ET for the goods supplied by them. The money exchanged for genuine transactions cannot be said to be financial flowback for the purpose of clubbing of clearances. Hence, the contention of the Revenue that there is financial flow back of money is incorrect and baseless.
- Goods cleared by SRC and ET are classifiable as parts of Air Conditioning and cannot be considered as complete Air Conditioning Unit. The Commissioner in the impugned Order has confirmed the demand based on the Orders dated 31.10.2011 & 2.11.2011 of the Assistant Commissioner. Since the Orders dated 31.10.2011 and 2.11.2011 of the Assistant Commissioner are already set aside by Commissioner (Appeals), the impugned Order treating the items in dispute as complete AC, is bad in law.
- The items in dispute can be classifiable as parts of AC only. When the same goods without the electromechanical equipment fitted by the Appellants are cleared by SRC and ET, they cannot be treated as complete AC. Hence, the contention of the Revenue that the items in dispute should be classified as complete AC and therefore chargeable to higher rate of duty, is incorrect and baseless.
- M/s SRC & M/s ET, like Appellant 1, were also engaged in supply, installation, testing at commissioning at site of Microprocessor based turnkey AC plants used mainly in telecom industries & data centers. The site work after dispatch of parts from the factory takes approx. 4 to 6 months period & then a complete AC plant is handed over to the client with acceptance testing done at site to

measure that desired temperature & humidity set points are achieved on round the clock 24 x 7 basis. Then seasonal testing of these AC plant is carried out in monsoon months & summer months for its final approval & acceptance with handing/taking over.

- Appellant 1 bought the parts from SRC/ET for 14 plants & sold them to MTNL as parts. Appellant 1 end product has been approved as parts. It is incorrect to suggest that Appellant 1 buy full AC Units & sell the same to MTNL as parts. Hence, the proposed classification as full AC is perverse and incorrect.
    - Board Order No. 58/1/2002-CX dated 15.1.2002 issued under Section 37B has specifically clarified in Para 5(ii) that the AC plants of this nature come into existence only at site & as such are not chargeable at factory as AC units at 60% duty but as parts only at 30% Duty.
    - Blue Star [2002(143) ELT 391 (T)]
    - Carrier Aircon Ltd. [2203 (154) ELT 710 (T).
- Ratio of the decisions relied upon by Commissioner in the impugned Order is not applicable to the facts of the present case.
- Appellant 1 should be allowed the benefit of MODVAT Credit of Rs.2,35,038 as available on the inputs procured by SRC/ET during the period under dispute if it is held that the benefit of SSI exemption would not be available to SRC and ET.
    - Siddhartha Tubes Ltd. [2006 (193) ELT 3 (SC)]
    - Mahavir Aluminium Ltd. – 2007 (212) ELT 3 (SC).
- Appellants submit that the sale price mentioned in invoice is cum-duty price and admittedly the Appellants have not recovered any duty from the customers. Hence, turnovers of Rs, 15.00 Lacs each of SRC/ET should be considered as cum duty price & reduced by the applicable excise duty to arrive at the correct sales price. This submission is fully supported by the Explanation to Section 4 of the Central Excise Act inserted with effect from 14.05.2003 by Finance Act, 2003.
    - Maruti Udyog Limited [2002 (49) RLT 1 (SC)]

- Indian Plastic Industries [2007 (210) ELT 534 (T)]
- Reliance Industrial Products [2010 (260) ELT 312 (T)].

- The department was well aware about the facts and the transactions of the appellants at the time of investigation only. The department was well aware of the facts of the transaction in the year 1995 itself. Hence extended period of limitation is not applicable for this SCN.
- Since the demand itself is not sustainable and therefore penalty is also not imposable on the Appellants and also the individual. There is no suppression of facts with intent to evade payment of duty and therefore imposition of penalty is incorrect and liable to be set aside.
- It is not possible to invoke Rule 173Q after 1.7.2001 without relying upon Section 38A. If that is so, then Explanation to Section 132 of Finance Act, 2001 which validates actions taken for the period prior to insertion of Section 38A, would come into action and no penalty can be imposed under 1944 Rules. Explanation reads as under:
    - "For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force."
    - Shaw Wallace - 2003 (156) ELT 406 (T)
    - Chemo Pulp - 2000 (119) ELT 715 (T-LB)
    - Ranga Vilas GS & W Mills – 2002 (149) ELT 742 (T-LB).
- Thus in no way in which penalty can be imposed under Rule 173Q and confiscation can be ordered.
- The Hon'ble Supreme Court in case of Punjab National Bank Vs. VOI – 2022 (2) TMI 1171 - SUPREME COURT has held that Rule 173Q(2) has been omitted with effect from 12.5.2000 and therefore any order passed after 12.5.2000 invoking Rule 173(Q) is not sustainable in law. Thus the imposition of redemption fine under Rule 173Q is not sustainable.
- Penalty has been imposed on individuals in the present case under Rule 209A of the erstwhile Central Excise Rules

1944. As mentioned supra, without invoking Section 38A, penalty cannot be imposed under Rule 209A on individuals also. It is further submitted that the imposition of penalty on individuals are not sustainable as there is no evidence to show that the individual has aided or abated with intent to evade payment of duty.

3.3 Arguing for the revenue learned authorized representative while reiterating the findings recorded in the impugned order submits as follows:

- The products said to have been manufactured by M/s ET and M/s SRC were actually manufactured by M/s UCSSPL. It was admitted in the statements of Directors, Partners and employees of M/s UCSSPL and others that these units had cleared 7 units each of complete air-conditioners. This is evident from the invoices issued in the name of these units.
- The decisions they relied upon are not relevant as explained below
- Reliance is placed on following decisions in the support of impugned order.
  - Supreme Washers (P) Ltd. [(2003 (151) E.L.T. 14 (S.C.))];
  - British Scaffolding India Pvt Ltd [(2014 (313) E.L.T. 87 (Tri. - Del.)] held affirmed by the Hon'ble Apex Court as reported in Euro Scaff (India) (2015 (323) E.L.T. A124 (S.C.)];
  - Box & Carton India Pvt. Ltd. [2008 (228) E.L.T. 85 (Tri. – Del)] affirmed as [2010 (255) E.L.T. A13 (S.C.)).
  - Sunsuk Industries [2018 (16) G.S.T.L. 469 (Bom.)]
  - Alpha Converting Machines Pvt Ltd [2018 (364) E.L.T. 141 (Tri. – Ahmd
  - Sri Vivekananda Industries [(2017-TIOL-3694-CESTAT-MAD
  - Chirag Electronics [(2014-TIOL-2327-CESTAT-DEL]
  - Himgiri Plastics and others [2017 (357) E.L.T. 153 (Tri. - Del.)] affirmed as reported at [2018 (360) E.L.T. A137 (S.C.)].

- Libra Engineering Works [2016 (339) E.L.T. 610 (Tri. - Ahmd.));
- Shree Rubber Works [2010 (250) E.L.T. 384 (Tri. - Ahmd.)]
- Modern Engineering Plastics Pvt Ltd [2009 (243) E.L.T. 289 (Tri. - Chennai)]
- Honey Biscuits Company [(2019-TIOL-1240-CESTAT-CHD)]
- Dilip Kumar & Company [2018 (361) E.L.T. 577 (S.C.)]
- Motiram Tolaram [1999 (112) E.L.T. 749 (S.C.)]
- Mysore Metal Industries [1988 (36) E.L.T. 369 (S.C.)]
- Satyam Technocast [2015 (322) E.L.T. 789 (S.C.)]

➢ The Appellants claim that penalty of Rs. One Lakh on Shri Shrikant Shirwadkar and Rs. Fifty Thousand on Shri Jayant Shirwadkar under Rule 209A are not sustainable as goods were not held liable to confiscation. They relied upon the judgment in the case laws of Castrol India Ltd. Vs Commissioner [2008 (222) E.L.T. 408 (Tribunal)] and Godrej & Boyce Vs Commissioner [2002 (148) E.L.T. 161 (Tribunal)]. Hon'ble Gujarat High Court in the case of Sanjay V Deora Vs CESTAT (2014 (306) ELT 533 (Guj.)] held that penalty under Rule 26 of Central Excise Rules, 2002 is leviable, can be imposed even if the goods are not confiscated or have not been rendered liable for confiscation or even if the show cause notice did not propose confiscation of goods. The SLP filed against this judgment was dismissed as reported in Sanjay V Deora Vs CESTAT [2014 (309) ELT A131 (S.C.)] Hon'ble CESTAT in the case of Amex Alloys P Ltd Vs Commissioner of C. Ex. & S.T., Coimbatore [2013 (296) E.L.T. 229 (Tri. - Chennai)] held that the reason that goods were not available to confiscation should not be a reason to avoid penalty. The provisions of Rules 26 of Central Excise Rules, 2002 and erstwhile Rule 209A ibid are pari materia with each other, Thus the penalties are correctly imposed and are sustainable.

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

4.2 Commissioner has recorded following findings in the impugned order:

"6.2. Regarding the Hon'ble CESTAT's observation about inconsistency observe that the main proposals of the SCN are as follows:

a. Short payment of duty by M/S UCSSPL due to misclassification of complete air-conditioners cleared as parts and accessories on payment of duty @30% adv. instead of 60% adv chargeable on complete air-conditioners.

b) Clubbing of the clearance of M/s Ultramatix and clearances shown by the two dummy units viz. M/s Shrikant Refrigeration Co. and M/s Excel Technologies with intent to evade the duty.

6.3. I find that regarding short payment of duty due to misclassification of the products manufactured by M/s UCSSPL, the original adjudicating authority felt that the classification list of M/s UCSSPL, which was provisionally approved under Rule 9B, was finally approved by the Divisional Asstt. Commissioner on 27.08.1999, followed by corrigendum dtd. 10.09.1999. The said classification list for the goods manufactured by M/s UCSSPL was finally approved holding the product as "parts of Air-conditioners'. However, the classification lists filed by other units, alleged to be dummy units, were pending final approval. As such, I find that the original adjudicating authority had rightly held that extended period could not be invoked on the demand for the goods manufactured by M/s UCSSPL. However, the provisional assessment requested for the goods manufactured by M/s SRC & M/s ET were pending finalization. In this regard, I do not find any fresh grounds or reason to differ with the stand taken by the original adjudicating authority. In doing so I draw sustenance from the Hon'ble CESTAT's decision in case of M/S Lamifab & Papers Ltd. V/s Commissioner of Central Excise & Customs, Aurangabad. [2012(275)E.L.T.93 (Tri. Mumbai)] wherein it has been held that since classification of the goods, in question, had been approved by the Asstt. Commissioner and this order of the Asstt. Commissioner has not been reviewed, then the duty demanded for the period relevant to the said order of classification is not sustainable. I further find that while allowing the benefit to the assessee with reference to finalization *of Classification list effective from 01.09.1994, the then Commissioner and the original adjudicating authority however had no option but to the order of finalization of Classification of the goods manufactured by M/s UCSSPL and drop the demand on the goods claimed to be parts of air conditioner only.*

6.4. However, I find that during the course of investigations conducted by the departmental officers additional aspects in this case emerged which indicated that the goods claimed to be parts of air conditioners were actually air-conditioners cleared in CKD/SKD condition and two dummy units were floated by the assessee for meeting the requirements of their customers viz. MTNL, DOT, AIR. In view of this new development, the SCN proposed to revise the classification of the goods as air-conditioner and deny the benefit of Notifn.75/87 dtd. 1.3.87 claimed by the assessee. As such, the part of demand, holding that the goods under consideration were not 'parts of air-conditioners' but 'air-conditioner', was confirmed by the then Commissioner invoking provisions of Sec.11 A (1). This is very much within the scope of the legal provisions, since this was an outcome of the investigations and new facts emerged during such investigation. It emerged that assessee's act of declaring said goods as parts of air conditioner was sheer mis-declaration with intent to evade the duty. During the course of investigation it has further emerged that the products said to have been manufactured by M/s Excel and M/s SR were actually manufactured for and on behalf of M/s UCSSPL. It has been admitted in various statements by the Directors, partners and employees of M/s UCSSPL and others, that these units had cleared 7 units each of complete air-conditioners. This is evident also from the invoices issued by these units at the time of clearances of the goods. In respect of the clearances of these 14 units of A.C Systems, MS UCSSPL had mis-represented to the department about the factual position thereby sought wrong benefit of SSI exemption under 75/87 dtd. 1.3.1987 by floating two dummy units viz. M/s Shrikant Refrigeration Co., and M/S Excel Technologies. This conclusion is supported by the relevant portions of the statements recorded of some of the persons *associated with M/s UCSSPL as well as with other two dummy units which are quoted as under:*

Quote: Statement of Shri. Jayant Shirwadkar, Partner, in M/s SRC, dtd. 18.02.1975:

"We were having a unit in Bhosari viz. Ms Ultramatix Systems Pvt. Ltd. engaged in manufacture, installation & commissioning of air-conditioning package units. We were not sure whether we should carry out the business in UCSSPL or USPL as collaborators agreement and the other things were uncertain. In 1994, after Budgel, we were not sure on which company the collaboration to be entered and in which unit the activities to be conducted after collaboration. This was because of drastic change in excise structure. We started planning to form partnership Co. Viz.. Ms Shrikant Refrigeration Co. having as partner Mrs. H.S. Shirwadkar and Mr. Jayant Shirwadkar; and Ms Excel Technology Corp. having partners Mrs. Anjali Shirwadkar and Mrs. I.A. Shriwadkar for manufacturing same activity. We got these registrations in the same shed. The premises 142/1, near Parmar Industrial complex, Chinchwad having compartments where these two companies started functioning independently"

He has further stated in his statement supra that "after the Budget got declared, we were not sure where air-conditioning activity, should be classified. Our major assembly goes at the site, so we started clearing the goods under parts and accessories of the air-conditioning units. Secondly our bankers were not ready to finance to Ms UCSSPL. So, we decided that we should now manufacture/assemble the units in M/s SRC and Ms ET. Considering production, execution urgencies we started operating in these two companies. We were under the impression that these two companies should avail the benefit and accordingly, we prepared the invoices and challans. These 14 units were cleared to Ms UCSSPL which in turn were cleared to MTNL."

6.5 I find that, Shri. Shrikant Shirwadkar, Director, UCSSPL, in his statement dtd. 01.10.1996 admitted that they did not receive any consideration from Ms SRC & M/s ET for labor force and machinery utilized by these floated units belonging to M/s

UCSSPL as there was no separate labour force and machinery belonging to M/s SRC & M/s ET. In his statement recorded on 5.5.95 Shri. Shrikant Shirwadkar further deposed that M/s SRC & M/S ET manufactured air conditioning systems which were cleared to M/s UCSSPL, who in turn sold these systems to their end customers. Also payments were received by M/s UCSSPL from the end customers and M/s UCSSPL made payments to M/s SRC & Ms ET on cash basis throughout the year. He further informed that raw material payments were made directly by M/s UCSSPL.

6.6. I find from the statement of Shri. Dilip Shrikrisha Yendole, accountant & authorized signatory of M/s SRC, recorded on 17.2.1995, that he has deposed that he has been appointed as authorized signatory of M/s SRC and he is signing the statutory excise invoices for the said company. Besides he is also doing the book keeping work for M/s UCSSPL, Chinchwad. To a specific question Shri. Yendole has deposed that 'we are pasting the stickers which contains the wordings "Made in India by ULTRAMATIX in technical collaboration with R.C. CONDIZIONATORY-ITALY."

6.7. I further find that Shri. Dilip Yendole , in his statement dated 17.2.1995 stated that the stickers as 'ULTRAMATIX' are affixed on the goods manufactured and cleared by these units. In this regard I find that in view of Explanation III inserted in Notification: 75/87-CE dtd.1.03.1987 by way of Notifn. No.11/94-CE dtd. 1.3.1994, exemption contained in this notification shall not apply to the specified goods bearing brand name, symbol, monogram, code number, drawing number etc.

6.8. I find that the two aspects taken into consideration by the then Commissioner, earlier adjudicating authority while passing the Order in Original No.42/CEX/2001 dtd.09.01.2002,are:

a. *Clearance of the goods manufactured and cleared by M/s UCSSPL claiming to be parts of all conditioner, of which the classification was approved. Hence the demand on this account was dropped.*
b. *Proposed change in classification of the goods as air conditioning system on the basis of new facts emerging out of investigation conducted and clubbing of the two*

dummy units floated by the assessee. On the basis of evidence on record the demand to this extent was confirmed.

6.9. Regarding mention of provisional assessment in the earlier Order-in-Original, I find a mention of finalization of provisional assessment of the classification list w.e.f. 1.9.94 filed by M/s UCSSPL. However, provisional assessments of the classification lists filed by M.s SRC & M/S ET were pending finalization; as such there was no mention of these classification lists in the order. I find that issuance of SCN for extended period when the assessments were pending finalization and confirming the demand based on the new facts on record was well within the scope of the provisions of the Act. While taking this view, 1 rely on CESTAT's decision in case of M/s Lamifab & Papers Ltd. V/s Commissioner of Central Excise & Customs, Aurangabad [2012(275)E.L.T.93 (Tri.- Mumbai)]. While deciding the aspect of time bar on the grounds of provisional assessment, the CESTAT in this case held that since the assessment for the said period were provisional, for the period subsequent to the change of classification by the department duty demanded on account of finalization of assessment is not hit by the limitation. In the instant case, I find that the Classification lists of M/s SRC & M/s ET which were approved provisionally by the jurisdictional Astt. Commissioner vide order No. V(84)17-- 30/CL/VC/94/1050 and V(84)17-28/CL/VC/94/1051 both dtd. 02.03.1995 respectively have been finalized by the Asstt. Commissioner, Incharge of Central Excise pune II Division vide Finalization Order No. V(84)15-25/Pt. II/Adj/Ultra/09-10 dtd.31.10.2011 and V(84)15. 25/Pt. II/Adj/Ultra/09-10 dtd.02.11.2011 respectively. I further take note that while finalizing these provisional assessments, benefit of Notification 75/87-CE dtd. 1.3.87 as amended by Notification No.11/94-CE dtd.01.08.94 has been denied to both these units.

6.10. The Hon'ble CESTAT in their remand order No. A/387-388/WZB/06/C-IV/9B dtd. 20.02.2006 has further observed that excise authorities have issued three registrations for same premises. I find from the registration certificates available on record that M/s SRC & M/s ET applied for Central Excise

Registration, for separate premises viz. plot No. 142/1A & 142/1B respectively i.e. the premises of all the three units were shown as three independent premises 142/1A 142/13 & 142/1 of M/s SRC, M/S ET & M/s UCSSPL respectively. Even the ground plans submitted by the assessee are showing these three premises as independent of each other having separate exit/gates, though the exit for Parmar Industrial Estate, where these three units are located, was common. Further, provisions of erstwhile Rule 174 (3) & (4) stipulated that 'if there are more than one premises requiring the registration he shall obtain separate registration. certificate for each of the premises and every registration certificate granted shall be in specified form and shall be valid only for the premises specified in such certificate'. From the evidences on record I find that the officer did not err while issuing separate registrations to the units in question on the basis of the documents produced at the material time. However, from the facts on record, it becomes evident that the three separate registrations were taken by Shirwadkar family ! with sole malafide intention to avail SSI benefit under Notification 75/87-CE dtd. 01.03.87.

7. M/s Ultramatix have submitted their defense along with a number of case laws supporting their contentions.

7.1. Assessee have argued that clearances of partnership firms cannot be clubbed with clearances of private limited company while denying turnover based exemption. Reliance is placed by the assessee on Board's Circular No. 6/92 dtd 29.05.1992 w. r. t. para 1(i) wherein it has been stated that Limited companies whether public or private are separate entities distinct from shareholders composing it. Hence each limited company is a manufacturer by itself and will be entitled to a separate exemption limit.

7.1.1. However, Para 1(ii) of the said circular elaborates that if one firm or one individual owns several factories he or it gets exemption only in respect of one lot and the manufacturer being only one entity there is no question of distributing the exemption. Further, while relying on this circular, clarification given in para 4 of the circular seem to have escaped the attention of the assessee wherein it has been clarified that the *question whether different partnerships having common partners, are treatable as separate manufacturers of the same manufacturer, would be a question of facts in each case to be determined on the basis of such factors, amongst other, like composition of the partnership, existence of the factory, license, nature of goods manufactured etc. The Circular leaves it to the discretion of the deciding authority to decide the matter on the basis of the facts of the case.*

7.1.2. I therefore hold that the partial application of the relied upon Circular by assessee is incorrect. Cognizance of all paras and clarifications given by Board in the circular has to be taken while deciding the issue. I find that Board's Circular supra implies that the matter of giving SSI benefit is to be decided on the facts of each case independently and considering the facts in the instant case, I find that even applying the parameters stipulated in the said circular, in view of guidelines given in para 4 of this circular, the assessee and other two units are not entitled for the benefit of Notification, since all the three units were one entity for all practical purposes. These facts have been already admitted to, by the Directors, partners and employees of the three units in their voluntary statements.

7.1.3 In the instant case it is established beyond doubt that all the three firms have common factory premises split into three parts for showing the manufacturing activity as separate entity, the partners are common in three companies and it can be concluded that the three units are family owned i.e. Shri Shrikant A. Shirwadkar and his wife Smt. Hema S. Shirwadkar are the Director of M/s UCSSPL Smt. Hema S. Shirwadkar and Smt Anjali Jayant Shirwadkar are the partners in M/s SRC and Jayant V. Shirwadkar Smt. Indumati A Shirwadkar are the partners in M/S ET. Goods manufactured by the three units are the same viz Split Air Conditioning Systems and labour, machinery all is common. As such in view of the facts on record and in view of para 4 of Board's said circular, I have no hesitation in concluding that M/s SRC & M/s ET were nothing but extension of M/s UCSSPL. These facts are accepted by the Director Partners of the company and other office bearers of the companies (reference- para 64 supra) Hence while deciding as to *whether M/s UCSSPL were entitled for SSI benefit, it is essential to take into consideration the turnover of the said three manufacturers. For the reasons stated hereinabove assessee's argument that clearances of partnership firms cannot be clubbed with clearances of private limited company does not hold water and hence cannot be acceded to*

7.1.4. M/s UCSSPL have also placed reliance on Supreme Court's decision in case of Supreme Washer (P) Ltd. V/s Commissioner of Central Excise, Pune [2003 (151) ELT. 14 (SC)]: However, this decision is not relevant to the facts of this case since in the case under consideration, Hon'ble Apex Court has remanded the matter back to Tribunal for fresh disposal in view of Board's Circular No.6/92 dtd 29.05. 1992 wherein it has been held that a limited company should be treated as separate entity for the purpose of exemption limit. However, while remanding the matter back for fresh decision, Hon'ble Supreme Court has doubtlessly supported Tribunal's finding that the units were having mutuality of interest, since the three units were having common management, common procurement of raw material, common manufacturing operations etc. The matter was remanded back for deciding a short portion as to whether Board's Circular No.6/92 supra was applicable in this case or not. The ratio of this decision is also not applicable in the instant case. It is evident from records that the goods manufactured by all the three units were same and label "Ultramatix" was affixed on the goods before clearance to the end clients/ customers. Further, M/s SRC & M/s ET cleared the goods first to M/s UCSSPL who in turn cleared the goods to the final customers. The payment/ recovery from the customers was effected by M/s UCSSPL who in turn paid the portion in the name of M/s SRC & M/s ET. Thereby it can be concluded that M/s SRC & M/S ET were merely bearing label of separate corporate identity but behind the corporate veil the three units were umbilically corded to M/s UCSSPL. Denial of turnover based exemption to M/s UCSSPL is supported by the ratio of Hon'ble Supreme Court's decision in case of M/s Box & Carton India Pvt. Ltd. V/s Commissioner [2010 (255) ELT A13 (S.C)] wherein Hon'ble S.C. has upheld Tri. Delhi's decision of clubbing of the clearances of

M/s Box & Carton Pvt. Ltd. and SFP and demand of duty raised on BCI by denying SSI exemption to SFP was sustained on the grounds that the two units were merely on paper holding the label of separate corporate identity but behind the corporate veil the two concerns were being seen as one unit and SFP was just extension of BCI as goods were actually manufactured in BCI but cleared through SFP.

7.2. Assessee's next defense is the two units were not dummy: This defense of assessee is based on the argument that M/s SRC & Ms ET were in existence before Ms UCSSPL was created and all the three units had three separate Central Excise Registrations. While weighing this contention it is imperative to consider various facts of the case. The documents on record show that the registrations were issued to M/s SRC & M/s ET on 05.05.1994 and to M/s UCSSPL on 05.08.1994. From the Central Excise Registration Certificates obtained by these units, bearing Registration No. 1002040567 (M/S UCSSPL), 1002040550 (M/s SRC) & 1002040549(M/s ET) it is seen that the goods intended to be manufactured by M/s UCSSPL, M/s SRC & Ms ET. as mentioned in the certificate are 'split type air conditioner' and the propose customers are shown as MTNL/DOT & Hospitals. I further find that Shri. Shrikant A. Shirwadkar in his statement dtd.23.02.1995 has deposed that Ms UCSSPL were engaged to Job work activity under erstwhile Rule 57F(2) of Central Excise Rules 1994 for M/s Ultramatix System Pvt.Ltd. Bhosari (in short USPL) since 1990-91 till Aug.1994. In Aug. 1994 Ms UCSSPL took Central Excise Registration for taking up manufacturing activity on its own. He has further deposed as under:

'i. As a short term arrangement to keep on serving the existing clients as well as to execute orders in hand of M/s UCSSPL we had to start M/s SRC to look after assembly operations which was previously done by M/s USPL, Bhosari.

ii. The workers and other supervisory staff were used from M/s UCSSPL and M/s USPL, Bhosari as and when needed, since there was no continuous work to provide them because of batch production activity.

iii Ms SRC was carrying out its activity in shed A whereas M/s ET were carrying its activity in shed B."

7.2.1 I find that the assessee have argued that separate Central Excise Registration was issued to each of the units & as per the procedure laid down in the Basic manual such registration is to be granted after verification of the ground plan with the actual premises. I find that the ground plan submitted by the three units at the time of applying for registration show three independent factory premises with clear cut separate boundary and separate exit/ gate for each unit. The three units were carved out of one industrial shed by putting mere partition for segregation of the premises. It can be presumed that this plan was matching with actual premises before issue of registration by the competent authority. The registrations were issued to M/s SRC & M/s ET on 05.05.1994 and to M/s UCSSPL on 05.08.1994. However, investigations were carried by departmental officers in the year 1995. In the Panchanama drawn on 17.2.1995 of the premises of 142/1C near Parmar Industrial Estate, Chinchwad in the presence of two independent Panchas and Shri. Dilip Yendole accountant of M/s UCSSPL it has been clearly mentioned that there is no clear demarcation and area of three units located therein viz. M/s UCSSPL. M/s SRC & M/s ET It is further mentioned in the Panchnama that they could see only big shed, certain components, wires and cables etc. lying on various iron racks and at one corner of the shed there were certain wooden cupboards which were having files and other records. There were no markings/ separations/ partitions showing existence of the three separate units. As also the stickers of M/s UCSSPL were found for air cooled conditioners with label as 'ULTRAMATIX in technical collaboration with R.C. CONDIZIONATORY-ITALY.

7.2.2. From these evidences on record I hold that the units at the time of applying for the registration had created temporary separate premises in such form which could easily be removed and converted into one premises. The units being registered as SSI, there were restrictions on the visit of departmental/ jurisdictional officer. As such there was no means to find out the factual position in routine course. The visit of the preventive officers was based on specific information received. And during this investigation it was revealed that the so called three units *did not have separate premises as shown at the time of obtaining registration.*

7.2.3. From the foregoing discussions it is established beyond doubt that the two & M/s ET were dummy units created by M/s UCSSPL with malafide intention of availing benefit of Notifn ./75/87-CE dtd.1.3.87.

7.3. Common office & staff are no ground for clubbing : Assessee have not denied that the office and staff of the units in question was common. They have tried to defend their point on the basis of case laws. However, after going through the citations produced by the assessee I find that the ratio of these judgments cannot be applied in the instant case since facts of these cases are different from the case in hand e.g. in case of M/s Renu Tondon V/s UOI (1993 (66) 375 (Raj.)], mutuality of interest could not be established, the two units though adjacent to each other had entered into rent deed etc., before setting up the business and based on other such facts of the case Tribunal has given a verdict that common staff & common office are not sufficient ground for clubbing in Renu Tondon V/s UOI case. Whereas in the instant case, not only the office and staff of the units was common but purchase of raw material was common, machinery was shared amongst these units and no legal documents such as rent deed etc. were produced in their defense. While holding that the three units were nothing but extension of M/s UCSSPL I draw sustenance from the judgment of Tri. Bombay in case of M/s Harnik Food Industries V/s Commissioner of Central Excise, Pune [2009 (243) E.L.T.322(Bom)] wherein based on identical evidences tribunal has held that cumulative effect of all the circumstances leads to conclusion of one unit being dummy of another.

7.4. No financial flow back: Though the noticee has claimed that there is no financial flow back, I find that the available record reveal the contrary situation and financial flow back can very well be established here. As regard mutuality of interest and financial flow back it is observed that Shri. Shrikant Shirwadkar in his supplementary statement dtd 5.5.95 has clearly deposed that 'M/s Excel and M/s SRC manufactured AC Systems which were sold to UCSSPL and UCSSPL inturn sold them to final *clients. M/s UCSSPL received payments from end clients for contract which was in turn paid on cash basis to M/s SRC & M/s ET throughout the year and the raw material purchases were paid directly to the suppliers. The balance amount is outstanding in books as debtors as of 31.3.95'. In his supplementary statement dtd.01.10.1996, Shri. Shrikant Shirwadkar further deposed that M/s SRC & M/s ET did not have separate machinery or labour and no consideration was being received by M/s UCSSPL for common usage of labour and machinery.*

7.4.1. In the case of M/s UCSSPL I further find that the contract/agreement for supply of split air-conditioners was between the ultimate customers and M/s UCSSPL. Various invoices on record reveal that M/s SRC and M/s ET supplied split air-conditioners to M/s UCSSPL only. As such it is evident that the goods were manufactured by M/s SRC & M/S ET for and on behalf of M/S UCSSPL.

7.5 Excel Technology and Shrikant Refrigeration not controlled By Ultramatix : The Directors and owners of the three units were of one family and closely related to each other and mutuality of interest is well established by the facts on record. As such, I find that the business was owned by one family with intent to avail turnover based SSI exemption under Notifn. 75/87- CE dtd. 1.3.87 and ratio of Tri. Mumbai in case of M/s Navarang Art Printers V/s Commissioner of Central Excise, Mumbai 2010(251)E.L.T.267(Tri.-Mumbai)] is squarely applicable when Tribunal has held that the very fact that same factory was used and shown as manufacturing unit by different units and the fact that two units actually had partners who were husband and wives and the third unit was limited company with two wives as directors, coupled with the fact on record, shows that the other two units were dummies and in reality the activities were carried out by main two partners.

7.6. SCN not issued to other Firms: Ms UCSSPL have put forth that SCNs are not issued to M/s SRC & Ms ET and it is settled law that the Show Cause Notice is required to be issued to all units whose clearances are proposed to be clubbed. Assessee have relied on various case laws of Tribunals. I find that though SCN has not been issued to M/s SRC & M/s ET, partners of these *two partnership firms are made party in the SCN. M/s SRC & Ms ET were floated as partnership firms and unlike in case of private limited company where a corporate body is a distinct juristic body, in case of partnership firm identity of firm stands merged with identity of the partners. As such I hold that non issuance of SCN to M/s SRC & M/s ET is of no consequence here. This view taken by me is supported by the decision of Hon'ble Supreme Court in case of Commissioner of Central Excise, Coimbatore V/s V. Madhu @C. V. Maadhesh [2002(146)E.L.T.252(S.C.)] where the Apex court has held that 'Splitting up of the Show Cause Notice of two units not necessary when stand of the department is that one firm is a fictitious firm or a dummy of the other-At the stage of issuance of Show Cause Notice, particularly when the view of the department is that one firm is fictitious business firm or a dummy of the other, it would be more easier and appropriate to examine the matter together'.*

7.7. Demand time barred: While taking this view, assessee have relied on the findings of the Order in Original passed by the then Commissioner C. Excise Pune I, holding therein that extended period is not applicable as far as clearances in respect of M/s UCSSPL is concerned. As such the demand being issued covering the period from Sept. 94 to March 99 is claimed to be time barred. I find that the employees of M/s UCSSPL have agreed that originally M/s UCSSPL were engaged in job work of M/s USP, Bhosari, during the period since 1991 till Aug. 1994. The Classification list w.e.f. 1.3.94 filed by M/s UCSSPL, which was approved provisionally was subsequently approved finally holding that the goods classified in the said Classification List were parts of air conditioners. Hence, the demand w. r. t. this CL was taken as time barred by the then Commissioner and adjudicating authority.

7.7.1 I find that, another aspect of the SCN is that, it is an outcome of investigations conducted the departmental officers which unearthed the fact that in reality M/s UCSSPL had changed business from job-work activity to manufacturing of split air-conditioning system Contracts with MTNL/DOT etc., were entered into for the said activity and the invoices of two dummy units, were in the name of M/s UCSSPL who in turn supplied the goods *to end customers. I find that assessee's argument regarding department blowing it hot and cold at the same time by holding that the two units manufactured the same products as that of main unit, has no force in it. M/s SRC & M/s ET were dummy units floated by M/s UCSSPL for meeting the huge demand of their customers while availing turnover based benefit of Notifn.75/87-CE. M/s SRC & M/s ET being units only on paper, the product split air-conditioner manufactured by these units further strengthens department's stand. The goods actually manufactured for and on behalf of M/s UCSSPL were shown as manufactured by M/S SRC & M/S ET, i.e. the dummy units for availing benefit of Notifn.75/87-CE dtd.1.3.87 as amended. In view of this discussion, I find that the demand for the element of suppression of facts is not hit by limitation and is sustainable in law. Ratio of Hon'ble Supreme Court decision, in similar issue, in case of Box & Carton India Pvt. Ltd V/s Commissioner [2010(255)E.L.T. A13 (SC))] is squarely applicable here. Hon'ble Supreme Court, in this case has held that extended period of limitation was invokable and demand under Sec.11 A of the Act was sustainable in view Tribunal's decision holding that knowledge of suppression of facts was relevant for computing the limitation period of five years.*

7.8. Goods are not classifiable as air conditioners: Regarding classification of the goods, assessee have argued that the components of air conditioning machines were supplied to MINL and after procuring some components from outside, the air conditioning plants were installed at site of MTNL and as such in view of Board's clarification given in Sec. 37B the classification of the goods claimed by the assessee as parts of air-conditioners is correct.

7.8.1. However, I find that from the agreement between M/s UCSSPL and MTNL it is seen that the agreement was entered into, for supply of air-conditioners. The invoices available on record show that complete air-conditioning systems have been cleared to MTNL. The SCN holds that the assessee cleared air-conditioners in CKD/SKD condition. Assessee had entered into contract of supply, installation, testing and commission of air-conditioners. As such it was imperative that some parts required *for installation and commission of the air-conditioners would be provided at site. As such, the clause regarding purchase of other components at site is appearing in the contract. On the basis of this inconsequential ground it cannot be concluded that the contract was for supply of parts of air-conditioners and not complete system. I find that Shri. Jayant Shirwadkar, in his statement dtd.6.4.95 has admitted that M/s ET had produced and cleared 7 air conditioning systems to M/s UCSSPL. Similarly Shri. Dilip Yendole, accountant & authorized signatory of M/s SRC, in his statement dtd.6.4.95, stated that M/s SRC had produced and cleared 7 air-conditioning systems to M/S UCSSPL. I find that acceptance of the facts by these two personnel, so also the other facts on record, are sufficient to establish that M/s UCSSPL were engaged in the manufacture of complete air-conditioners.*

8. In view of the foregoing discussions I am convinced that only to evade their full duty liability, M/S UCSSPL had floated two dummy units viz. M/s SRC & M/s ET for execution of pending orders of split type air-conditioning systems and with intent to avail the benefit of Notification 75/87-CE dtd. 1.3.87 as amended. The partners in these dummy units were immediate family members of the Director of M/s UCSSPL. As such the SCN issued invoking provisions of Sec.11A, demanding duty on 14 units of split air conditioning systems is sustainable and M/s UCSSPL is liable for penal action under Rule 173Q of Central Excise Rules. Also, the Director of the said company and partners of the two dummy units have rendered themselves liable for penal action under Central Excise Rules.

8.1 I find that while computing the demand, 15 units of air-conditioners are taken into consideration. However, invoices for 14 units of air-conditioning systems are available on record and duty on these 14 units works out to be of Rs.18,00,000/- and invoice for one unit valued at Rs.2,25,000/- could not be traced. As such I hold that duty of Rs. 1,35,000/- on one unit is not demandable.

8.2 I also hold that provisions of Sec.11AB & Sec.11AC cannot be invoked in this case since these provisions were made *applicable from Sept. 1996, whereas the period covered in the SCN is from Sept. 1994 to March 1996.*

4.3.1 Appellants have challenged the findings of fact recorded in the impugned order. However on examination of facts, evidences and statements recorded under Section 14 of Central Excise Act, 1944 we observe as follows:

4.3.2 The Appellants' claim that the value of clearance of the two units cannot be clubbed with the clearance of M/s UCSSPL is not sustainable. The case laws they relied upon in support of their claim are not relevant in the facts and circumstances of the case. Here specific 14 clearances shown in the name of two units are in question. There is sufficient evidence suggesting that there was only one manufacturing entity namely M/s UCSSPL. M/s SRC and M/s ET were only used for bifurcating the value of clearances of UCSSPL to remain in the exemption limit. The goods in question are actually manufactured by UCSSPL only as there was free transfer of funds, of labour, of materials, and of machines, there was common manufacturing process, common labour etc. Their registration with Income Tax, Sales Tax Registration (of UCSSPL dtd. 1/4/1996 (pg.256, 257 of appeal book) of SRC on 31/3/95 (pg.258 and 259 of appeal book) and M/s ET on 31/3/1995 (pg.260, 261 of appeal book)] do not alter the fact that the goods were manufactured by UCSSPL. It can be seen that the goods were shown as removed from the premises of M/s ET and M/S SRC under proforma invoices cum gate passes nos. 1 dtd. 12/9/1994, 2 dated 16/9/1994 (pg.113), and 4 dtd. 19/11/1994 of M/s SRC and proforma invoice (cum gate pass) nos. 1 dated 17/9/1994, 2 dated 19/9/1994, 3 dtd. 20/9/1994 and 4 dated 30/12/1994 (pgs.116 to 119) of M/s Excel Technology Corporation and as per the own admission of the Appellants they were neither registered with Sales Tax or Income tax when the goods were shown as removed from the said M/S ET and M/s SRC. Even the claimed partnership was not registered during the said period. Further UCSSPL was having Income Tax registration dtd. 29/2/1991 (pg.262) prior to M/s ET (PAN dated 10/3/1995 page 264) and M/s SRC (PAN dtd. 10/5/1995 page 263)

4.3.3 It can be seen from the Panchanama drawn on 17/2/1995 at the premises of UCSSPL (page 75), when Shri Yendole was asked to show separate premises for the three factories as per ground plan submitted to Range Superintendent at the time of taking Central Excise Registration, Shri Yendole explained that he was unable to point out the demarcation and area of these three factories. It was found by the panchas that under one big shed certain components, wires and cables were lying on various iron racks and in wooden cupboards files were kept. There was no markings, separations, partitions to show that three different units exists there, there was no different gates for these three factories. Stickers bearing the text "MADE IN INDIA BY ULTRAMATRIX IN TECHNICAL COLLABORATION WITH R.C. CONDIZIONATORY -ITALY" were also found in the premises. Shri Yendole has admitted the panchnama as correct. There was no complaint from the Appellants against the panchanama. The Appellants claim that they were having a different electrical connection is incorrect inasmuch as UCSSPL had no power to sublet the premises. No photograph is annexed to the Appeal memo. Further what is required is a separate electrical bill to show that M/S ET and M/s SRC were having different electrical connections. Common staff at Pune is admitted. No consideration was given for use of machinery. Since all the goods concerned were admittedly manufactured in the premises of M/s UCSSPL using their machinery and employees, M/S UCSSPL are the actual manufacturers of these goods and they have to pay duty thereon.

4.3.4 As alleged in the SCN first para, ET and SRC managed to obtain separate registration by showing separate demarcated premises but when physically verified as recorded in Panchanma dated 17/2/1995 there was no demarcation or separation of the premises. M/s ET and M/S SRC had already surrendered their registrations in March 1995 (page nos.321 and 323 of main appeal book). Since the classification dispute was pending the same could not be cancelled as informed to them vide letters dated 28/7/1995 (pages 322 and 324 of main appeal book).

4.3.5 It can be seen from the condition no.7 of the agreement dated 1/1/1994 between M/s D.R. Shah & Co. (page 163 of appeal) and M/s UCSSPL that UCSSPL could not give on licence or part with the use of any part of the said property in any manner whatsoever. The Appellants have relied upon the two Lease agreements both dtd. 1/5/1994 between UCSSPL and SRC and between UCSSPL and ET. It seems that these documents annexed by the Appellants as Sub-lease agreement were not registered. Section 49 of the Registration Act, 1908, sets out the consequences of non-registration of documents, which are required to be compulsorily registered. Section 49 makes it clear that a lease deed which is compulsorily registerable, if not registered, will not affect the immovable property comprised therein in any manner. Such a lease deed will also not be received as evidence of any transaction affecting such property. From the statements of the concerned persons also it is evident that these rent and lease agreements were not available at the material time.

4.3.6 The manufacturing activities were carried out in Pune only and the Appellants in the ground of appeal at D-5 admitted that the work force in Pune was common.

4.3.7 The Appellants have taken a plea that the machinery used by M/s SRC and M/s ET were allowed to be used under a lease arrangement and a separate consideration was charged. However, in the statement recorded during the investigation it was specifically admitted to the contrary and this was never informed. No evidence in support of the same have been furnished till date.

4.3.8 It is evident that separate registrations under Central Excise Act were obtained inter alia by suppressing the facts.

- Hon'ble Supreme Court in the case of Union of India Versus Jain Shudh Vanaspati Ltd. 1996 (86) ELT 460 (S.C.)] held –

  6. *The case of the appellants in the show cause notices is that the stainless steel containers in which the said oil was imported were banned, that the stainless steel containers were deliberately camouflaged by painting them to resemble mild steel containers, and that this was done with a view to enabling their clearance.* ***A clearance***

order under Section 47 obtained by fraudulent means such as this (if it, in fact, be so) cannot debar the issuance of a show-cause notice for confiscation of goods under Section 124. Fraud, if established, unravels all. An order under Section 47 obtained by the employment of fraudulent methods does not have to be set aside by the exercise of revisional powers under Section 130 before the ill-effects of the fraud can be set right by initiation of the process of confiscation of the fraudulently cleared goods under Section 124.

- Hon'ble CESTAT in the case of Samsung India Electronics Ltd. [2014 (307) E.L.T. 160 (Tri. - Del.)] held

"14. If a party makes representations which he knows to be false and injury ensues therefrom although the motive from which the representations proceeded may not have been bad is considered to be fraud in the eyes of law. It is also well settled that misrepresentation itself amounts to fraud when that results in deceiving and leading a man into damage by willfully or recklessly causing him to believe on falsehood. Of course, innocent misrepresentation may give reason to claim relief against fraud. In the case of Commissioner of Customs, Kandla v. Essar Oil Ltd. - 2004 (172) E.L.T. 433 (S.C.) it has been held that by "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill-will towards the other is immaterial. "Fraud" involves two elements, deceit and injury to the deceived.

15. Undue advantage obtained by the deceiver will almost always cause loss or detriment to the deceived. Similarly a "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See : S.P. Changalvaraya Naidu v. Jagannath [1994 (1) SCC 1 : AIR 1994 S.C. 853]. It is said to be made when it appears that a false representation has been made (i) knowingly, or (ii) *without belief in its truth, or (iii) recklessly and carelessly whether it be true or false [Ref : Roshan Deen v. Preeti Lal [(2002) 1 SCC 100], Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education [(2003) 8 SCC 311], Ram Chandra Singh's case (supra) and Ashok Leyland Ltd. v. State of T.N. and Another [(2004) 3 SCC 1].*

16. Suppression of a material fact would also amount to a fraud on the court [(see Gowrishankar v. Joshi Amha Shankar Family Trust, (1996) 3 SCC 310 and S.P. Chengalvaraya Naidu's case (AIR 1994 S.C. 853)]. No judgment of a Court can be allowed to stand if it has been obtained by fraud. Fraud unravels everything and fraud vitiates all transactions known to the law of however high a degree of solemnity. When fraud is established that unravels all. [Ref : UOI v. Jain Shudh Vanaspati Ltd. - 1996 (86) E.L.T. 460 (S.C.) and in Delhi Development Authority v. Skipper Construction Company (P) Ltd. - AIR 1996 SC 2005]. Any undue gain made at the cost of Revenue is to be restored back to the treasury since fraud committed against Revenue voids all judicial acts, ecclesiastical or temporal and DEPB scrip obtained playing fraud against the public authorities are non est. So also no Court in this country can allow any benefit of fraud to be enjoyed by anybody as is held by Apex Court in the case of Chengalvaraya Naidu reported in (1994) 1 SCC I : AIR 1994 SC 853. Ram Preeti Yadav v. U.P. Board High School and Inter Mediate Education (2003) 8 SCC 311.

17. Evidence Act does not insist on absolute proof for the simple reason that perfect proof in this imperfect world is seldom to be found. That is why under Section 3 of the Evidence Act, a fact is said to be 'proved' when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, acts upon the supposition that it exists. This definition of 'proof' does not draw any distinction between circumstantial and other evidence. Preponderance *of probability comes to rescue of Revenue and Revenue is not required to prove its case by mathematical precision. Thus, if circumstances establish that there is high degree of probability that a prudent man ought to act on the supposition that there was design to secure fake, false, forged or illegitimate DEPB scrip to clear imports duty free in contravention of the law or abetting to achieve such ill object, such act against public Revenue calls for penal consequence to curb such mischief.*

18. A person whose case is based on falsehood has no right to seek relief in equity [Ref : S.P. Chengalvaraya Naidu v. Jagannath, AIR 1994 S.C. 853]. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. [Ref : Commissioner of Customs v. Essar Oil Ltd., (2004) 11 SCC 364 = 2004 (172) E.L.T. 433 (S.C.)].

19. When material evidence establishes fraud against Revenue, white collar crimes committed under absolute secrecy shall not be exonerated as has been held by Apex Court judgment in the case of K.I. Pavunny v. AC, Cochin - 1997 (90) E.L.T. 241 (S.C.). No adjudication is barred under Section 28 of the Customs Act, 1962 if Revenue is defrauded for the reason that enactments like Customs Act, 1962, and Customs Tariff Act, 1975 are not merely taxing statutes but are also potent instruments in the hands of the Government to safeguard interest of the economy. One of its measures is to prevent deceptive practices of undue claim of fiscal incentives.

20. It is cardinal principle of law which is enshrined in Section 17 of Limitation Act that fraud nullifies everything for which plea of time bar is untenable following the ratio laid down by Apex Court in the case of CC. v. Candid Enterprises - 2001 (130) E.L.T. 404 (S.C.). Non est instruments at all times are void and void instrument in the eyes of law are no instruments. Unlawful gain is thus debarred.

21. Fraud and justice do not dwell together for which penal provisions are enacted to eradicate evils of defrauding Revenue which is anti-social activity adversely affecting public revenue. Such provisions are construed in the manner which curbs the mischief, promote their object, prevent their subtle evasion and foil their artful circumvention. Thus construed, the term fraud within the meaning of these penal provisions is wide enough to take in its fold any one or series of unlawful acts committed or omissions made. An act of fraud on Revenue is always viewed seriously. "Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter.

22. Applying the aforesaid principles of law, in these appeals, when material evidence gathered by Revenue remains uncontroverted, adjudication findings sustain. Accordingly appellants fail to succeeded on merit and on the fact and circumstances of the cases. It can unambiguously be held that there was deliberate mis-declaration of the description of goods exported and DEPB scrips were fraudulently obtained. Use of such non est scrips to discharge import duty against subsequent imports covered by the five appeals of the appellant company is recoverable with penal consequences of law."

4.3.9 Such documents which were obtained fraudulently by suppressing the facts cannot be taken as valid defence. It is also pointed out that in the present case the contract against which all the supplies were made was made by the Appellant 1 and the goods were cleared after putting the sticker *"MADE IN INDIA BY ULTRAMATRIX IN TECHNICAL COLLABORATION WITH R.C. CONDIZIONATORY -ITALY".* This sticker clearly declares that the goods were manufactured by Ultramatrix in technical collaboration with R C Condizionatory –Italy. That being so the claim that these goods were manufactured by someone else goes contrary to declaration made by the Appellant to their customers/ while making the supplies.

4.3.10 It is also noted that the appellants have admitted during investigation that from M/s MTNL to whom these goods were supplied they collected the duty at the @ 30% as provided by their contract, but against these 14 Air Conditioning Systems the duty was not deposited.

4.3.11 In view of the discussions as above we do not find any merits in the submissions of the appellant in respect of finding of facts.

4.4.1 In the impugned order it has been held that this is a case where in the corporate veil needs to be lifted to determine the true nature of transactions. Hon'ble Supreme Court has in case of Calcutta Chromotype [1998 (99) E.L.T. 202 (S.C.)] has held as follows:

12. The principle that a company under the Companies Act, 1956 is a separate entity and, therefore, where the manufacturer and the buyer are two separate companies, they cannot, than anything more, be `related persons' within the meaning of clause (c) of sub-section (4) of Section 4 of the Act is not of universal application. Law has traveled quite a bit after decision of the House of Lords in the case of Salomon v. Salomon [1897 AC 22]. This is how this Court noticed in Tata Engineering and Locomotive Company Ltd. v. State of Bihar & Ors. [(1964) 6 SCR 885] :

"The true legal position in regard to the character of a corporation or a company which owes its incorporation to a statutory authority, is not in doubt or dispute. The corporation in law is equal to a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purposes; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the corporation. This

position has been well-established ever since the decision in the of Salomon v. Salomon & Co. [(1897) A.C. 22 H.L.] was pronounced in 1897; and indeed, it has always been the well recognised principle of common law. However, in the course of time, the doctrine that the corporation or a company has a legal and separate entity of its own has been subjected to certain exceptions by the application of the fiction that the veil of the corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more."

13. In Life Insurance Corporation of India v. Escorts Ltd. & Ors. [(1986) 1 SCC 264], this Court again considered this question and said :

"While it is firmly established ever since Salomon v. A. Salomon & Co. Ltd. [(1897) AC 22 HL] was decided that a company has an independent and legal personality distinct from the individuals who are its members, it has since been held that the corporate veil may be lifted, the corporate personality may be ignored and the individual members recognised for who they are in certain exceptional circumstances. Pennington in his Company Law (4th Ed.) states :

Four inroads have been made by the law on the principle of separate legal personality of companies. By far the most extensive of these has been made by legislation imposing taxation. The Government, naturally enough, does not willingly suffer schemes for the avoidance of taxation which depend for their success on the employment of the principle of separate legal personality, and in fact legislation has gone so far that in certain circumstances taxation can be heavier if companies are employed by the taxpayer in an attempt to minimise his tax *liability than if he uses other means to give effect to his wishes. Taxation of companies is a complex subject, and is outside the scope of this book. The reader who wishes to pursue the subject is referred to the many standard text books on Corporation Tax, Income Tax, Capital Gains Tax and Capital Transfer Tax.*

The other inroads on the principle of separate corporate personality have been made by two sections of the Companies Act, 1948, by judicial disregard of the principle where the protection of public interests is of paramount importance, or where the company has been formed to evade obligations imposed by the law, and by the Courts implying in certain cases that a company is an agent or trustee for its members.

In Palmer's Company Law (23rd Ed.), the present position in England is stated and the occasions when the corporate veil may be lifted have been enumerated and classified into fourteen categories. Similarly in Gower's Company Law (4th Ed.), a chapter is devoted to `lifting the veil' and the various occasions when that may be done are discussed. In Tata Engineering and Locomotive Co. Ltd. [(1964) 6 SCR 885], the company wanted the corporate veil to be lifted so as to sustain the maintainability of the petition, filed by the company under Article 32 of the Constitution, by treating it as one filed by the shareholders of the company. The request of the company was turned down on the ground that it was not possible to treat the company as a citizen for the purposes of Article 19. In CIT v. Sri Meenakshi Mills Ltd. [AIR 1967 SC 819], the corporate veil was lifted and evasion of income tax prevented by paying regard to the economic realities behind the legal facade. In Workmen v. Associated Rubber Industry Ltd. [(1985) 4 SCC 114], resort was had to the principle of lifting the veil to prevent devices to avoid welfare legislation. It was emphasised that regard must be had to substance and not the form of a transaction. Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable *to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc."*

14. In M/s. Mcdowel and Company Ltd. v. Commercial Tax Officer [(1985) 3 SCC 230 = (1985) 154 ITR 148], this Court examined the concept of tax avoidance or rather the legitimacy of the art of dodging tax without breaking the law. This Court stressed upon the need to make a departure from the Westminster principle based upon the observations of Lord Tomlin in the case of IRC v. Duke of Westminster [(1936) AC 1] that every assessee is entitled to arrange his affairs as to not attract taxes. The Court said that tax planning may be legitimate provided it is within the framework of law. Colourable devices, however, cannot be part of tax planning. Dubious methods resorting to artifice or subterfuge to avoid payment of taxes on what really is income can today no longer be applauded and legitimised as a splendid work by a wise man but has to be condemned and punished with severest of penalties. If we examine the thrust of all the decisions, there is no bar on the authorities to lift the veil of a company, whether a manufacturer or a buyer, to see it was not wearing that mask of not being treated as related person when, in fact, both, the manufacturer and the buyer, are in fact the same persons. Under sub-section (1) of Section 4 of the Act, value of the excisable goods shall not be deemed to be normal price thereof, i.e., the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, if the buyer is a related person and price is not the sole consideration for sale. As to who is a related person, we have to see its definition of Section 4(4)(c) of the Act. It is not only that both, the manufacturer and the buyer, are associated with each other for which corporate veil may be lifted to see who is behind it but also that they should have interest, directly or indirectly, in the business of each other. But once it is found that persons behind the manufacturer and the buyer are same, it is apparent that buyer is associated with the manufacturer, i.e., the *assessee and then regard being had to the common course of natural events, human conduct and public and private business it can be presumed that they have interest, directly or indirectly, in the business of each other (refer Section 114 of the Evidence Act). It is, however, difficult to lay down any broad principle to hold as to when corporate veil should be lifted or if on doing that, could it be said that the assessee and the buyer are related persons. That will depend upon the facts and circumstances of each case and it will have to be seen who is calling the shots in both the assessee and the buyer. When it is the same person the authorities can certainly fall back on the third proviso to clause (a) of Section 4(1) of the Act, to arrive at the value of the excisable goods. It cannot be that when the same person incorporates two companies of which one is the manufacturer of excisable goods and other is the buyer of those goods, the two companies being separate legal entities, the Excise authorities are barred from probing anything further to find out who is the person behind these two companies. It is difficult to accept such a narrow interpretation. True that shareholdings in a company can change but that is the very purpose to lift the veil to find out if the two companies are associated with each other. Law is specific that when duty of excise is chargeable on the goods with reference to its value than the normal price on which the goods are sold shall be deemed to be the value provided (1) the buyer is not a related person and (2) the price is the sole consideration. It is a deeming provision and the two conditions have to be satisfied for the case is to fall under clause (a) of Section 4(1) keeping in view as to who is the related person within the meaning of clause (c) of Section 4(4) of the Act. Again if the price is not the sole consideration, then again clause (a) of Section 4(1) will not be applicable to arrive at the value of the excisable goods for the purpose of levy of duty of excise.*

4.4.2 Hon'ble Supreme Court in the case of Supreme Washers (P) Ltd. [(2003 (151) E.L.T. 14 (S.C.)];

5.*Having heard the learned Counsel for the parties and perusing the records, we are in agreement with the finding of the Tribunal that there is mutuality of interest between the appellants. The reliance placed by the Tribunal on facts like the* *three companies having common management under Shri S.L. Raheja, having common procurement of raw material having common stock accounting and planning, having interdependence in manufacturing operations, having common stock of raw materials and semi finished goods, having common use of machinery between the three units, having common marketing arrangements and free flow of finance between three units cumulatively indicates interdependence of the three units with each other as also inter-relationship, cumulatively establishes the appellants inter-relationship and interdependence with each other, hence, the arguments of the appellants on this factual score must fail.*

4.4.3 CESTAT in the case of British Scaffolding India Pvt Ltd [(2014 (313) E.L.T. 87 (Tri. - Del.)] held as follows:

"7.1 However in most of the cases, the fact of common ownership of different units by a person is not so obvious and may be carefully camouflaged. For example - if there is a manufacturing unit of a proprietorship concern of a person 'X', there is a second manufacturing unit owned by a partnership concern 'A' with 'X' and his wife 'Y' as partners, there is a third manufacturing unit owned by a private limited company 'B' with shareholding by 'X', his son 'Z' and the partnership concern 'A' and there is a fourth manufacturing unit owned by another private limited company 'C' with shareholding by 'A', 'B' and another son Z2 of 'X' and if these four units owned by 'X', 'A', 'B' and 'C' are each availing of SSI Exemption, a question arises as to whether they are to be treated as separate entities or units owned by the same person, for the purpose of SSI Exemption.

7.1.1 While a company is a legal person entirely distinct from its shareholders, in terms of Apex Court's Judgment in case of Income Tax Commissioner, Madras v. Meenakshi Mills, Madurai, reported in AIR 1967 Supreme Court 819, in certain exceptional cases, the court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade and that the court has powers to disregard the corporate entity if it is used for tax evasion or to circumvent the tax obligation. Same view has been taken by the Apex Court in cases of :-

(a) Calcutta Chromotype v. Collector of Central Excise, reported in 1998 (99) E.L.T. 202 (S.C.) = (1998) 3, SCC-681;

(b) Subra Mikharjee & another v. Bharat Cooking Coal Ltd., reported in (2000) 3 SCC-312; and

(c) Delhi Development Authority v. Skipp Construction Co. (P) Ltd., reported in (1996) 4 SCC-622.

The Apex Court in the case of Associated Rubber Industry Ltd., reported in 1986 (157) ITR-77 (S.C.), relying upon its earlier judgment in case of Medowell & Co. Ltd. v. CTO, reported in 1985 154 ITR-148, 161 (S.C.) has held that even if companies are distinct legal entities having separate existence, this is not the end of the matter and it is the duty of the Court in every case, where ingenuity is expended, to get behind the smokescreen and discover the true state of affairs. Thus, the principle of lifting the corporate veil for discovering the true state of affairs behind the veil of the corporate entity is a well settled legal principle. It is this principle which has to be applied for determining as to whether two or more manufacturing units owned by separate partnership firms, private limited companies and/or public limited companies are to be treated as the units of the same manufacture. On this point, the Apex Court in case of CCE, Delhi v. Modi Alkalies & Chemicals Ltd., reported in 2004 (171) E.L.T. 155 (S.C.), has held that when on lifting the corporate veil it is found that only one person/company has extraordinary interest and pervasive control over the financial matters and management of other companies, irrespective of the latter having separate sales tax, income tax and central excise registration, their clearances have to be clubbed for determining their eligibility for the SSI Exemption Notification No. 1/93-C.E. In this regard, Para 87 of the judgment is reproduced below :-

"Whether there is inter-dependence and whether another unit is, in fact, a dummy has to be adjudicated on the facts of each case. There cannot be any generalization or rule of universal application. Two basic features which prima facie show interdependence are pervasive financial control and management control. In the present case facts clearly show financial control. Undisputedly, the share capital of each of the three companies was Rs. 200/-. Though it was claimed that

financial assistance was availed from the financial companies, it is on record that the unsecured loans advanced by MACL to the three companies were substantially heavy amounts as on 1-4-1998. NGCPL received an amount of Rs. 1.55 crores. About 14 lakhs appeared to have been paid after the issue of show cause notice. Loans advanced to NGCPL was about Rs. 52 lakhs while to SCGCPL it was about Rs. 65 lakhs. The finding of the Commissioner that the financial assistance from the financial institutions were availed with the aid and assistance of MACL has not been seriously disputed. Apart from that, the cylinders were brought on lease by MACL from another concern and were sub-leased to the three companies. The cylinders bore the name of MACL. If the three companies had separate standing as contended it could not be explained why they could not get the cylinders directly from the lessors on lease basis and the need for introducing MACL as the lessee and then the three companies becoming sub-lessees. As noted by the Commissioner, entire receipts were paid as lease amount to MACL. Here again, the under-valuation aspect assumes importance. While the supply by MACL to three companies was Rs. 0.50 per unit, the sale price by the three companies was Rs. 5 per unit. It is on record that accounts were kept by common staff and marketing was done under the supervision of a person who belongs to the same group of concerns. The amounts have been collected by an employee of MACL. The so-called Directors of the companies were undisputedly employees of MACL. Almost the entire financial resources were made by MACL. The financial position clearly shows that MACL had more than ordinary interest in the financial arrangements for companies. The statements of the employees/Directors show that the whole show was controlled, both on financial and management aspects by MACL. If these are not sufficient to show inter-dependence probably nothing better would show the same. The factors which have weighed with CEGAT like registration of three companies under the sales tax and income tax authorities have to be considered in the background of factual position noted above. When the corporate veil is lifted what comes into focus is only the shadow and not any substance about the existence of the three companies independently. The Circular No. 6/92, dated 29-5-1992 has no *relevance because it related to Notification No. 175/86-C.E., dated 1-3-1986 and did not relate to Notification No. 1/93. The extended period of limitation was clearly applicable on the facts of the case, as suppression of material features and factors has been clearly established. If in reality the three companies are front companies then the price per unit to be assessed in the hands of MACL is Rs. 5 and not Rs. 0.50 as disclosed. The question whether there was manufacture or not was not in issue before the Commissioner. The plea that there was no manufacture has also to be rejected in view of the fact that exemption was claimed by the three companies as manufacturers to avail the benefit of Central Excise Notification No. 1/93.*

Same view has been expressed by the Apex Court in its judgment in case of Supreme Washers Pvt. Ltd. (Supra).

7.1.2 The Board's Circular No. 6/92, dated 29-5-1992 clarifying that limited companies, whether public limited or private limited are separate entities and each such limited company is a manufacturer by itself and would be entitled for SSI Exemption separately, has not considered the principle of lifting of corporate veil in the cases where different corporate entities appear to be just colorable devices for tax evasion, and hence this circular is not in accordance with the provisions of law. In accordance with Apex Court's Judgment in case of CCE v. Ratan Melting & Wire Industries, reported in 2008 (231) E.L.T. 22 (S.C.) = 2008 (12) S.T.R. 416 (S.C.), a circular which is contrary to the statutory provisions, has no existence in law. Though in case of Supreme Washers Pvt. Ltd. (supra), after upholding the principle of lifting of corporate veil the Apex Court taking note of the Board's Circular No. 6/92, dated 29-5-1992, had remanded the matter to the Tribunal for examining the applicability of this circular, since this circular being contrary to the law laid down by the Apex Court in the case of Income Tax Commissioner, Madras v. Meenakshi Mills, Madurai (supra), M/s. Calcutta Chromotype v. CCE (supra), Delhi Development Authority v. Skippe Construction Co. (P) Ltd. (supra), Associated Rubber Industry Ltd. (supra) and CCE v. Modi Alkalies & Chemicals Ltd. (supra), has no existence in law, the Appellant's plea for decision of this *matter on the basis of Board's Circular No. 6/92-C.E. is not acceptable.*

7.1.3 Thus, if there is evidence on record to prove that a particular person, whether natural or juristic, has comprehensive financial and management control over several entities and is the actual beneficiary of their activities, the clearances of the factories owned by these entities are to be clubbed for the purpose of determining their eligibility for SSI Exemption by treating them as the units of only one manufacturer, even if those units are owned by different public limited companies, private limited companies or partnership firms. If on clubbing their clearances during the preceding financial year, the aggregate value of the clearances is found to be exceeding the threshold limit for SSI Exemption, the SSI Exemption would have to be denied to each of them and if each of them is a functioning unit and not a non-functional dummy unit, the duty can be demanded separately from each unit.

7.1.4 However, if there is only one unit which is functioning unit and other units are just dummy units, not actually engaged in manufacturing activities, duty would have to be demanded only from the existing unit by treating the other units as dummy units, and clubbing the clearances made in the name of those dummy units with the clearances of the main unit and for this purpose, there is no need to invoke the provision regarding clubbing in the SSI Exemption Notification."

The civil appeals filed against this order by the appellants were dismissed by the Hon'ble Apex Court as reported at [2015 (323) E.L.T. A124 (S.C.)] , [2015 (325) E.L.T. A145 (S.C.)] & [2016 (335) E.L.T. A163 (S.C.)].

4.4.4 In the case of Box & Carton India Pvt. Ltd. [2008 (228) E.L.T. 85 (Tri. - Del.)] tribunal held-

"5. We have considered the rival submissions. The undisputed facts are as under :

(1) While SFP is a proprietorship concern of Shri S.K. Gandhi since 1-4-02 (earlier a partnership concerned with his real brother Shri A.K. Gandhi as the other partner), BCI is a private limited company with Shri A.K. Gandhi, Ms. Pushpa Gandhi wife

of Shri S.K. Gandhi and Ms. Reena Gandhi, wife of Shri A.K. Gandhi as Directors and since admittedly Ms. Reena Gandhi and Ms. Pushpa Gandhi are inactive Directors, BCI is being run by Shri A.K .Gandhi, the real brother of Shri S.K. Gandhi, the Proprietor of SFP. Both the units are situated on adjacent plot.

(2) While both the units have machinery for manufacture of corrugated boxes and polythene bags, SFP does not have any power connection and claim to be running the machinery by an electric generator SFP does not has any printing machinery for printing the carton.

(3) Both the units have a common telephone and fax number installed in the premises of BCI and share common staff and common office located in BCI's premises.

(4) It has not been disputed that on many occasions, Shri S.K. Gandhi has signed the letters of BCI and Shri A.K. Gandhi signed the letters of SFP without any such authorization.

(5) The raw material procurement is not only procured from the same source and under a common sales tax registration number in the name of SFP, but it has also been found that on numerous occasions, the raw material procured in the name of SFP was actually received in the premises of BCI.

(6) On several occasions, BCI has written to his customers offering to supply corrugated boxes through SFP. BCI vide letter dated 24-9-01 had intimated to Maruti Udyog Ltd. that they have a stock of 5335 boxes which can be supplied through their associate concern SFP in which case they would not be charge with excise duty. Similarly, BCI vide their letter dated 14-3-2000, intimated M/s. JCT that since 16% excise duty has been imposed on corrugated boxes, they can supply the corrugated boxes through their sister concern SFP, which is an exempted SSI unit and M/s. JCT was requested to issue a purchase order in the name of SFP. This letter to JCT had been signed by Shri S.K. Gandhi on behalf of BCI though on paper Shri S.K. Gandhi was supposed to have nothing to do with BCI.

5.1 The explanation given for Shri S.K. Gandhi of SFP signing without any authorisation from BCI, the letters on behalf of BCI (reminding the buyers for payment as well as quoting the rates *of corrugated boxes manufactured in BCI) and Shri A.K. Gandhi of BCI signing, without any authorization from SFP, letters on behalf of SFP to SFP's customers; receipt in the premises of BCI of the raw material purchased in the name of SFP and numerous instances of BCI offering to supply corrugated boxes to its customers through SFP to enable them to save the excise duty, are not at all satisfactory.*

5.2 From the above facts the inescapable conclusion would be that though on paper BCI and SFP bear the label of separate corporate identity - BCI a private limited Company with Shri A.K. Gandhi, his wife and wife of Shri S.K. Gandhi as Directors and SFP, a proprietorship concern of Shri S.K. Gandhi, behind this corporate veil, the two concerns are being run as one unit. The absence of machinery for printing cartons in SFP and there being no power connection in it coupled with the above mentioned letters of BCI to its customer offering to supply the corrugated boxes through SFP are a clear indication that SFP is just an extension of BCI and two units were being run as one unit only and the goods actually manufactured in BCI were being cleared through SFP claiming SSI exemption. The Commissioner, therefore, has rightly clubbed the clearances of the two units and demanded duty from BCI by denying the benefit of SSI exemption to SFP.

5.3 It has been pleaded that in para 73 of the Commissioner's order, the Commissioner has given a finding that the BCI and SFP are independent units. But on going through para 73 of the order, it is found that what the Commissioner has observed that it has not been disputed i.e. BCI and SFP are working units. There is no finding of the Commissioner that the two are independent units.

5.4 It has been pleaded that since BCI had never availed the SSI exemption and therefore, there is no question of denying the same to it and no question of demand of duty from them. This contention is not acceptable, as when, as discussed above, the BCI and SFP are being run as one unit and SFP was being used by BCI for clearance of its goods without payment of duty, the clearances of SFP have rightly been clubbed with the clearances of BCI and duty has been rightly demanded from BCI on this *basis invoking proviso to Section 11AC(1) of the Act. For this it is not necessary to invoke clause 2(vi) & 2(vii) of exemption Notification No. 8/99-CE and corresponding clauses of successor notifications just because these clauses have been invoked, the demand of duty does not get vitiated.*

6. It has been pleaded that some the officers had visited the units on 27-3-03 and the SCN had been issued on 1-9-04, for demand of duty for short paid duty for the period from 1-8-99 to 31-3-04, the duty demand for the period from 27-3-03 to 31-7-2003 is time barred and in this regard, the reliance has been placed on the Tribunal judgment in the case of Nizam Sugar Factory v. CCE reported in 1999 (114) E.L.T. 429. However, this judgement does not help the appellant as in this case, it has been held that the date of knowledge of the departmental officers in respect of clandestine removal of goods/suppression of facts is not relevant for the purpose of computing the period of five years and the date for this purpose is the "relevant date" as defined in Section 11A(3)."

Civil Appeal against this order dismissed as reported at [2010 (255) E.L.T. A13 (S.C.)).

4.4.5 Hon'ble Bombay High Court has in case of Sunsuk Industries [2018 (16) G.S.T.L. 469 (Bom.)] held that-

"18. *Now, coming to the impugned judgment of the Appellate Tribunal, we must note here that in paragraph 2 of the order, a concession of the Learned Counsel for the appellants is noted that the appellants are not disputing classification of Filter Parts, Humidifier Parts, Valve Parts and Gauges. As noticed in the earlier part of the judgment, the major dispute raised was as regards the Battery Parts. The appellants claimed that the Battery Parts fall under the heading 39.26 whereas the Department treated it as falling under the heading 85.07. In paragraph 4, the Appellate Tribunal noted that it was not disputed that Plastic Spill Proof Vent Plugs, Flame Retardant Microporous Vent Plugs, Ceramic Vent Plug, Microporous Vent Plug, Aqua Trap Vent Plug and Microporous Filter Discs are used in Batteries as battery parts. A finding was recorded that Heading 39.26 is for residual plastic items. The entries under Heading 84.21 are of filtering or purifying machinery apparatus* *and parts thereof. The Appellate Tribunal placed reliance on Section Note 2 of Section XVI which provided that parts of the battery have to be classified under Heading 85.07. We have perused the Section Note 2 referred by the Appellate Tribunal. We have also perused the relevant entries under Heading 39.26. It is a residual heading containing plastics which are not covered by any other item.*

19. *As regards clubbing, the Appellate Tribunal held that the appellants in these appeals are two different manufacturers, but finished goods are produced using the machinery and product facilities in the unit of the appellant in appeal No. 196 of 2005. We must note here that even in the reply of the appellants in both the appeals to the show cause notice, this factual allegation is not disputed. Therefore, it was rightly held that the clearances are required to be aggregated in terms of the Notification No. 1/93-C.E. We have perused the decision in the case of Gajanan Fabrics relied upon by the appellants. The said decision deals with the peculiar facts of the case before it. In the present case, in view of the admitted facts, clause 3 of the amended Notification No. 1/93-C.E. will apply. Hence, on the aspect of clubbing, it is not possible to find fault with the finding in the impugned judgment."*

4.4.6 CESTAT in the case of Alpha Converting Machines Pvt Ltd [2018 (364) E.L.T. 141 (Tri. - Ahmd.)] held as follows:

"10. We have gone through the rival submissions. We find that the entities namely, M/s. Alpha Converting Machines Pvt. Ltd. (1997), M/s. Alpha Flexible Machinery (2002) and M/s. Alpha Convert Machines Industries (2003) came into existence in different years. They also have separate registrations with Ahmedabad Municipal Corporation and Sales Tax Authorities. Revenue has however, relied on the facts that during the search, it was found that all the units were using common premises and common machinery. The material was flowing from one unit to another freely and no separate records for raw materials issued for production were being maintained. The power connection were common for all the entities. When, however, Sh. Rajan David was asked to produce the bills of the machinery purchased, he could not do so on the pretext that the

machineries were old. In his submission dated 7-1-2008, he admitted that he uses the machines for manufacture of the goods irrespective of its ownership. He also admitted that he issued raw material of production as per requirement and that factory shed belong to him and no payment of rent towards use of land and building and plant and machinery was made by M/s. Alpha Converting Machines Pvt. Ltd. He also admitted that they had one single electric connection. When he was asked to explain the various financial transaction between the different entities, he could not explain any. In these circumstances, the Revenue confirmed the demand of excise duty by clubbing. Notification 8/2003-C.E., dated 1-3-2003 relates to SSI Exemption. The said notification exempts following from Central Excise duty.

TABLE

S. No.	*Value of clearances*	*Rate of duty*
(1)	*(2)*	*(3)*
1	*First clearances up to an aggregate value not exceeding one hundred lakh rupees made on or after the 1st day of April in any financial year.*	*Nil*
2	*All clearances of the specified goods which are used as inputs for further manufacture of any specified goods within the factory of production of the specified goods.*	*Nil*

Section 2(v), (vi) and (vii) reads as follows :

(v) where a manufacturer clears the specified goods from one or more factories, the exemption in his case shall apply to the aggregate value of clearances mentioned against each of the serial numbers in the said Table and not separately for each factory;

(vi) where the specified goods are cleared by one or more manufacturers from a factory, the exemption shall apply to the aggregate value of clearances mentioned against each of the

serial numbers in the said Table and not separately for each manufacturer;

(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.

11. From the above, it is apparent that all clearances of all manufacturers from one factory needs to be clubbed to arrive at the aggregate value of exemption available under Notification 08/2003. Similarly all clearances made by one manufacturer from more than one factory need to be clubbed to arrive at the aggregate value of clearances for the purpose of Notification 8/2003-C.E.

12. In the facts of this case it is seen that the appellant have not been able to produce any document showing purchase of machinery by the units namely, M/s. Alpha Flexible Machinery and M/s. Alpha Convert Machines Industries. In his statement dated 7-1-2008 Sh. Rajan David admitted that all the machines are being used commonly and that factory shed belong to him and no rent was being recovered. He had also failed to explain the transfer of funds from one entity to another. In these circumstances, the only conclusion that can be reached is that it was one factory and M/s. Alpha Flexible Machinery and M/s. Alpha Convert. Machines Industries are not manufacturers as they do not possess any machinery or premises of their own. All the transactions of all the 3 entities were being made by Sh. Rajan David. The buyers also knew only Sh. Rajan David. In these circumstances, the only conclusion that can be reached is that there was only one factory belonging to M/s. Alpha Converting Machines Pvt. Ltd. which came in existence in 1997. Thereafter entities namely, M/s. Alpha Flexible Machinery and M/s. Alpha Convert Machines Industries were created on paper without any manufacturing facility to show clearances and to avail small scale benefit. The Ld. Counsel has relied on the decision in case of Sree Nirmal Spinners, 2014 (300) E.L.T. 469 (Tri.-Chen.). In the said case the appellant showed payment on conversion charges, lease rent for use of machinery. The *allegation in the said case was based essentially on the ground that the partners belong to same family. In the said case also the appellant had separate electricity connection, shed as well as machinery. In the instant case, however, there is no separate electricity connection and there is no machinery owned by the dummy units. Moreover, there was no evidence in the said case regarding financial flowback whereas in the Instant case the appellant has failed to explain the transactions made between the 3 entities. Thus, the facts are significantly different in the instant case. Ld. Counsel has relied on the decision in case of Jifcon Tools Pvt. Ltd. (supra). In the said case, units sought to be clubbed, had separate premises, independent electrical connection, independently financed by MSFC, independent capital machinery supported with by respective purchase invoices, independent labor force at the factory. In the instant case, there is no independent machinery, no separate record of raw materials used, no separate electrical connection and funds, the facts are significantly different. In the case of Jifcon Tools Pvt. Ltd. (supra), the demand was essentially raised on account of common partners and the two entities. Other than that, there was separate premises with separate manufacturing facilities and separate licenses of each entity thus, the facts in the instant case are significantly different. Ld. Counsel has also relied in the case of National Adhesive & Chemicals (supra). In the said case that there was no charge regarding absence of independent machinery to manufacture the goods, also there was no evidence of common funding. In the instant case, the appellant could not produce any evidence regarding independent machinery and thus the facts in the instant case are also different. Ld. Counsel has also relied on the decision in case of Vaspar Concepts (P) Ltd. (supra), in the said, there was no evidence that the unit existed on paper only and had no machinery, in the instant case, it has been admitted by Sh. Rajan David that there was no machinery of the other two entities.*

13. Ld. Counsel has also argued that in failure to issue SCN for all three entities is bad in law, he relied on the decision of Hon'ble High Court of Calcutta in case of Diamond Scaffolding Co. (supra) and decision in the case of East India Cotton

Manufacturing Co. Ltd., 2003 (160) E.L.T. 1165 (Tri.-Del.) to assert that the clearances cannot be clubbed without issuing notice to all the entities. As against this, Ld. AR has relied on the decision of Hon'ble Apex Court in the case of Gajanan Fabric Distributors while remanding the matter back to Collector, Hon'ble Apex Court observed as follows :

"2. We find, after having heard Learned counsel, that it is necessary to remand the matters to the Collector to consider the entire case afresh. The principal factor that leads us to this conclusion is the finding of the Collector, upheld by the Tribunal, that the seven units which are the appellants before us "are only a corporate facade although registered with the various authorities with a view to camouflage their actual identity and thereby avail of the exemption which, otherwise, would be inadmissible to them". The Tribunal failed to give due attention to the fact that the Collector had confirmed, in the sum of Rs. 11,84,708.51, the demand made in the show cause notices upon all seven units and their partners or Directors. Having regard to his conclusion that all units other than Gajanan Weaving Mills were fictitious units, the sequitur, one would have assumed could only be that it was Gajanan Weaving Mills which was the assessee and liable to satisfy the demand. By confirming the demand upon all the seven units the Collector appears, however, to have treated them all as assessees and, implicitly recognised their independent existence."

14. Ld. AR had argued that demand can only be confirmed against the entity which is not dummy entity as held by Hon'ble Apex Court. He argued that in these circumstances, issue of SCN to all entities would be of no avail. He further argued that all 3 entities were represented by Sh. Rajan David and thus there was no violation of principles of natural justice as notice was issued to Sh. Rajan David. We find force in the argument of Ld. AR. The entire argument of Revenue is based on the fact that only one entity has factory/machines and other two are creations on paper to avoid payment of tax. In these circumstances, recognition of separate existence by issue to SCN would have run counter to the allegation that they are dummy. Moreover, we find opportunity was given to Sh. Rajan David to defend and *he was authorized signatory of all entities. In these circumstances, we do not find any merit in appeal and the same is dismissed."*

4.4.7 In the case of Sri Vivekananda Industries (2017-TIOL-3694-CESTAT-MAD)] Tribunal stated as follows:

"7. The allegation is that the appellant unit is the main unit and Sri R.D. Pandian who is proprietor is controlling all the other three units which were floated by Sri R.D. Pandian in the name of his wife and other family members. The goods manufactured by four units in question were classifiable as RTS Grills, Clamps, eye bolts etc. which are all goods related to electricity line materials. It is also brought out that all the units were sharing the same machinery and were engaged in the manufacture of electricity line materials only and had not manufactured any other goods. Further, oxygen cylinders purchased by the appellant was used for welding by other units also. The appellant has tried to counter these allegations by stating that they have only used hand tools for manufacture of electricity line materials and no other major machineries were used by them. Further, it is also seen that the raw materials purchased by one unit has been diverted to other unit and the wages of the workers are paid by other units. These specific allegations in SCN have not been adequately explained by the appellant. It is seen that Shri R.P. Pandian was dealing with the bank transaction of other units as is evidenced by the deposits, withdrawals etc. Similarly, the orders for purchase of raw materials for all units were made by Shri R.D. Pandian. These facts point out to the strong inference that the appellant unit is the main unit and the other units are only dummy units created for the purpose of evading central excise duty by suppressing the value of clearances.

8. The fact that all the three units are situated at one place which is separated by passages; that all the four units belong to the same family members; that account of one unit is seen reflected in the account of another unit; that the raw materials are used in common or being diverted to the other unit; the use of machineries commonly by all the four units as well as the workers in all the four units being the same; the conclusion reached by the adjudicating authority, in our view is right and *proper. We therefore are able to hold that the department has been able to sufficiently establish that there existed flow back of funds and mutuality of interest among four units. We find no ground to interfere with the findings made by the adjudicating authority."*

4.4.8 In Chirag Electronics and [2014-TIOL-2327-CESTAT-DEL] tribunal held-

" 4. We have perused the impugned order. As regards the clubbing, we find that the impugned order has fully taken into accounts the facts like unity of control, financial flow back, absence of manufacturing facility at M/s. CPMPL, common employees and office, and rent-free space given to M/s. CPMPL and after a detailed discussion supported by judicial pronouncements has clearly established the sustainability of the allegation that clearances of two units are to be clubbed as M/s. CPMPL was merely a dummy unit of M/s. CE. The adjudicating authority also established on sustainable basis that the brand name " Chirag " did not belong to the appellants but actually belonged to others who have been mentioned by name in the impugned order. Mr. Praveen Parashar's application to get the said brand name registered in his name had not been approved. That the brand name happens to be the same as the name of a son in the family does not make the brand name belong to them. As M/s. CPMPL is found to be a dummy unit, the seizure and subsequent confiscation is also clearly sustainable as has been brought out by the adjudicating authority. The appellants' contention that semi finished goods can not be seized is totally devoid of any legal basis as Section 110 of Customs Act (Made applicable to Central Excise Act 1944 by virtue of Section 12 thereof) nowhere debars seizure of semi-finished goods if they are liable to confiscation.

5. As regards penalty on Mr. Praveen Parasher , it is seen that he is the proprietor of M/s. CE and therefore, as penalty on M/s. CE has been imposed, separate penalty on Mr. Praveen Parasher is not warranted. But in the present case, Mr. Praveen Parasher was the main person and was the master mind behind the whole modus operandi (beyond his role as proprietor) as has been clearly brought out in the impugned order. Therefore penalty on *him is not only attracted but also warranted. Ms. Hemlata Parasher as Director of Mr. CPMPL knowingly participated in the entire modus operandi and she as Director allowed M/s. CPMPL to knowingly and willingly provide cover by pretending to be as SSI manufacturer though they did not have any infrastructure for doing so. So liability of Ms. Hemlata Parasher to Penalty is not questionable."*

4.4.9 In the case of Himgiri Plastics [2017 (357) E.L.T. 153 (Tri. - Del.)] tribunal held that

"5.*We have heard both the sides and perused the appeal records. The tax liability of HP as confirmed by the original authority is mainly on the ground that HPC though shown as having legal existence is nothing but creation to avoid Central Excise duty by availing ineligible SSI exemption by HP. It is seen that HP are engaged in the manufacture of lay flat tubing and bags of plastic. HPC are engaged in the manufacture of master batches and fillers. It is an admitted fact that all the activities of HPC are looked after by Shri Jogineder Kumar Talwar and Shri Sanjeev Kumar Talwar, Partners of HP. Further, it has been brought out during investigation that HP and HPC do not have separate arrangement for keeping raw materials and finished goods and these are stored in common premises only. It is also recorded by the original authority that in many cases raw material like soapstone [powder] was purchased by HP and then used by HPC. There is no accounting or documentation for proper receipt and transfer for a consideration of these items.*

6.*Further, evidences in the form of loan transaction between the partners of the firms common procurement of raw material, intermixed documentation of sale of final products were brought on record during the proceedings. The statements recorded during the investigation clearly brought out the common procurement of raw material and their consumption in these two units without any restriction. On careful consideration of the evidences available in this regard, it is clear that there is complete common administration and financial control of the two firms. Day-to-day affairs of HPC are managed by the partners of the HP. As already noted that both the firms belong to the same family i.e. one firm owned by husbands as partners another firm* *is owned by wives as partners. In such situation, when overwhelming common interest is involved, it is not necessary to point out individual instance of financial benefit to one number or other of the same family. The question of financial flow back gets shadowed in a situation like this where a small group of close family members are managing the intricately connected two partnership firms involved in same business."*

Affirmed by the Hon'ble Supreme Court as reported at [2018 (360) E.L.T. A137 (S.C.)]]

4.4.10 In the case of Libra Engineering Works [2016 (339) E.L.T. 610 (Tri. - Ahmd.)) tribunal held that

***"6.** On analysing the evidences on record, we find that the Central Excise officers visited the unit of the appellant, that is, M/s. Libra Engineering Works and after taking stock of the machineries installed in the said unit, visited the premises of M/s. Accurate Engineers also to ascertain the machineries installed therein. After drawing necessary panchnama at both these units, the statement of Proprietor of the appellant, that is, Shri Asgarali A. Siddiqui, was recorded who has admitted that both units were engaged in the manufacture of Industrial valves falling under Chapter 84 of CETA, 1985 and availing SSI exemption Notification No. 08/2003-C.E., dated 1-3-2003 separately. Also, he has further stated that the other unit in which his wife was the proprietress had been handled/controlled by him. The officers during the course of investigation also recorded the statements of buyers who equivocally stated that for the purpose of purchase of finished goods, invariably they contact Shri Asgarali A. Siddiqui, and the goods were sent in the invoices of M/s. Accurate Engineers. The proprietress Smt. Halimakatun A. Siddiqui, in her statement admitted that she was a housewife and not involved in the management of the business of manufacturing/selling of industrial valves. Analysing these uncontradicted evidences, we do not harbour any doubt that even though M/s. Accurate Engineers, on record, a separate unit, but, its day to day function and management was handled by Shri Asgarali A. Siddiqui, proprietor of M/s. Libra Engineering Works and his wife Smt. Halimakatun A. Siddiqui has lent her name as proprietress of the firm. In other words, for all practical* *purposes, the management/control of the business of manufacture and sale has been handled by Mr. Asgarali A. Siddiqui, proprietor of the Appellant. In these circumstances, we do not find any error in the order of the authorities below in clubbing the clearance value of both the units for the financial year 2005-06 in computing the eligible limit of 100 Lacs for the Appellant Unit prescribed under Notification No. 08/2003-C.E., dated 1-3-2003 and confirmed the duty short paid and penalty imposed."*

4.4.11 In Shree Rubber Works and others Vs CCE, Surat [2010 (250) E.L.T. 384 (Tri. - Ahmd.)] tribunal held:

"Learned advocate has drawn our attention to various decisions of the Tribunal laying down that common partner in the two offices or having common office etc., cannot be made ground for clubbing the clearances of the two units. However, we find that the ratio of the above units is not applicable to the facts of the instant case, inasmuch as the core issue is not clubbing of clearances of the two units, but relates to the clearances of finished product actually manufactured in the factory of M/s. Shree Rubber Works in the name of M/s. Shree Ambica Rubber Co. The appreciation of evidences on record leads us to only one inevitable conclusion that the goods were being manufactured in the factory of M/s. Shree Rubber Works. Admittedly, at the time of visit of the officers in the factory of M/s. Shree Ambica Rubber Co., no manufacturing activity was witnessed and the machinery installed therein was found to be in dis-mantled condition. Electricity connection was found to be disconnected and electric consumption as revealed by the Electricity department was found to be Nil. The cumulative effect of all the above evidences is that the goods were never manufactured in the factory of M/s. Shree Ambica Rubber Works during the relevant period. If the goods were not manufactured therein, the same could not have been cleared under the bills and invoices of the said company. As such, all the goods cleared under the name of the said company are actually manufactured in the factory of M/s. Shree Rubber Works. This conclusion also gets further corroborated from the fact that excess stock of final product and the semi-finished goods was found at the time of visit of the officers in the

factory of M/s. Shree Rubber Works. All the statements recorded during investigation are inculpatory and gives the details of modus operandi adopted by M/s. Shree Rubber Works to clear the goods in the name of M/s. Shree Ambica Rubber Co. with an intention to remain within the exemption limit. No pleas have been made before us to rebut the evidences so collected by the officers during the course of investigation and relied upon by the authorities below in their impugned order. We find that there is enough evidence to uphold the findings against the appellant. We, accordingly, find no justification to interfere in the orders passed by the authorities below confirming demand and imposing penalty upon all the appellants."

4.4.12 In the case of Modern Engineering Plastics Pvt [2009 (243) E.L.T. 289 (Tri. - Chennai)] tribunal held-

*"**4.** We find that there was no clear-cut demarcation between the factory of MEPP and that of EPI whose proprietrix was the wife of the Managing Director of MEPP. Further, raw materials for the manufacture of finished products had been stored in a single room without any identification as to which one belongs to MEPP or EPI. There was only one electricity connection for both the units. It was claimed that a submeter had been installed but, such plea is only an after thought which has rightly been rejected by the lower authorities. EPI also had not purchased cutting machine, oven, winding machine and welding torches which were the machinery absolutely necessary for the manufacture of FRP/PVC tanks, vessels, pipes and fittings etc. as brought out from the process of manufacture as furnished by MEPP as under :-*

"Process of manufacture of FRP tanks, vessels and pipelines :

(i) The required raw materials for fabrication of FRP Tanks, vessels and pipelines were Bisphenol resin, wasothalic polyester resin and vinyl ester resin. The other raw materials were surface mat, chopped stranded mat (CSM), woven rovings, rovings etc.

(ii) The polyester resins were being supplied by M/s. Bakelite Hylam Limited and the mat materials such as surface mat, chopped stranded mat etc. were being supplied by M/s. FGP Ltd. These raw materials were to be used mixing in suitable

proportion with catalyst and accelerator. The type of polyester resin was decided according to the purpose to which the tanks or pipelines were subjected to use.

(iii) The tanks and other process vessels will be fabricated after making the necessary mould according to the dimensions and then FRP line by hand laid up, filament winding technique making use of the filament wound machine installed at our workshed. Here again, the type of resin was to be chosen according to the service conditions to which the pipelines would be used."

The non-availability of the minimum machinery required for the manufacture of final products drives the lost nail in the coffin of EPI's claim that they were an independent unit. We therefore, agree with the lower authorities that EPI is only a shadow concern of MEPP which was floated to avail improper SSI exemption. As regards MFE, it was a proprietary concern of Shri P. Raman during 1990 and later a new company MEPP was formed with Shri R. Raman and his mother as partners. It is clear that MFE was rechristened as MEPP with a few cosmetic changes in its constitution and the person at the helm of affairs remain the same, the manufacture also remains the same and therefore MFE rightly been held to be a shadow unit of MEPP. Further, we note that MEPP had categorically stated that it had no objection to the value of MFE's clearance being clubbed with its clearance value. The appellants have also not seriously challenged the finding of mutuality of interest and financial flow back. The evidence on record also establishes that bills for purchase of materials by one unit have been settled by another unit. All these points to the inescapable conclusion that MFE and EPI were only facades companies floated by MEPP, to gain undue benefit under the SSI exemption notification.

5. *We are also in agreement with the finding that MEPP was guilty of suppression. The argument that they were under the bona fide belief that the other two units were independent units merits rejection, as they have not been able to explain the basis of such belief. The plea that RT-12 returns were being filed regularly by MFE and EPI, and hence clearance by the two units was within the knowledge of the department is rejected for the* *reason that this is a new plea which was not raised either in the reply to the Show Cause Notice or in the appeal before the lower appellate authority and such plea has not been raised even in the present appeal and the plea also remains unsubstantiated. Therefore, MEPP's intention to evade payment of duty is clearly evident and invocation of the proviso to Section 11A of the Central Excise Act, 1944, for the purpose of demand of duty for the extended period is justified. For the same reason, penalty upon MEPP is also warranted."*

4.5.11 CESTAT has in the case of Honey Biscuits Company [(2019-TIOL-1240-CESTAT-CHD)] held:

"19. From the facts and discussion above, we find that all the business affairs of both M/s. HBC and M/s. HCW like purchase of raw material, production, despatch, collection of sale proceeds etc were managed by Sh Montoo and Sh Jai Prakash. They are members of one family running both the units though these units have different family members as their partners. It is also evident that goods were moved in same vehicle under same invoices/kachha slip by the same salesman. Amount collected by the salesman (sometimes in parts) cannot be segregated between the two units. The Benami accounts maintained with Oriental Bank of Commerce were used for transactions in respect of both the units. Since financial transactions cannot be segregated between the two units mutuality of interest is thus clearly established.

20. From the written submissions made at the time of hearing, we find that the appellant is contesting only that the clearances of M/s.HCW be not clubbed and inclusion of other partners, namely, Ms.Geeta Rani, Sh. Jai Prakash and Sh. Kaushal Kumar. It is contended that attribution to Geeta Rani about private records does not attribute criminality to her as she was only a sleeping partner. We find that the private records amongst other places were recovered from the residential premises of Smt Geeta Rani and this fact of recovery of the records from her residence was admitted by her in her statement dated 14.10.1996.

21. The appellant have contended that the liability lays with managing partner of M/s. HBC. The appellant have also *contended that proceeds of raw material and other goods were duly submitted to the office of Sh.Montoo only and there was no proof of any payment by Sh. Jai Prakash on behalf of appellant. We find that the investigation has established that both Sh Montoo and Sh Jai Prakash used to make entries in the private ledgers (party wise and station wise) maintained by them. The total amount of each slip was entered in the ledgers. The deliveryman after handing over the goods to the shopkeepers/dealers used to collect part payment also and record same on the kuchha parchies. The remaining payments were also collected by the deliverymen and handed over to S/Sh Montoo and Jai Prakash. The slips were in the handwriting of both Sh Montoo and Sh Jai Prakash. Moreover, they were found to be maintaining six benami accounts with OBC for deposit of money received from bogus invoices. Chief Manager of the bank and also Sh Montoo admitted that they were operating three accounts each by S/Sh Montoo and Jai Prakash. Hence, we are not convinced by the contention that the entire operation was handiwork of Sh. Montoo only without involvement of Sh. Jai Prakash.*

22. It has also been contended that there was no mutuality of interest in the business of any of the separate units and control of appellant M/s. HBC was with Sh. Montoo as only Managing Partner. We find that mutuality of interest is established in as much as that the accounts relating to purchase of raw material / sales of finished goods were commonly maintained. Goods sold from both the units were entered in common slips and payments received were entered in common slips/ledgers. The proceeds were deposited in six benami accounts, three operated by Sh.Montoo and other three by Sh.Jai Prakash. The control of the units thus was with both Sh Montoo and Sh Jai Prakash.

23. It has also been argued that the clubbing of value of clearance of M/s. HBC with M/s. HCW was not proper as it was set up in year 1983 and M/s. SFPL was registered as SSI unit. We find that in July, 1992, the unit of M/s.HBC came into existence. Earlier, same unit was working in the name and style as M/s Snack Foods (P) Ltd. M/s. SFPL was registered with department and was paying duty. As the control of the unit *remained with the same family, name of the unit appears to have been changed for the sole motive of duty evasion. However, it was shown as on lease. In the present proceedings neither any demand has been confirmed against M/s. SFPL nor have its clearances been clubbed with M/s. HBC. These facts have nothing to do with the clubbing of clearances of M/s. HBC and M/s. HCW. Thus, the factum of one unit on lease does not make any difference in this case. The kachha records were resumed from the residential premises, factory premises and office premises of M/s.HBC. The office of M/s. HBC was being maintained inside M/s.MEW and the manufacturing unit of M/s. HCW existed on the first floor of same building of M/s.MEW. Hence it cannot be said that no records were recovered from M/s. HCW.*

24. It is also contended that both the firms had separate manufacturing premises, separate machinery manufacturing different goods and were owned by separate partnership firms. We find that while the units have separate premises with separate machinery owned by separate firms, the partners of both the firms are close relatives and members of same family and as elaborated earlier there was overarching control of Sh.Montoo and Sh. Jai Prakash on these firms. In M/s. HBC biscuits were being manufactured and in M/s. HCW both biscuits and sweets (Toffies and Golis) were being manufactured. However, the entire operations from raw material to deposit of proceeds of sales was combined as has been painstakingly elaborated by adjudicating authority in para 32 of impugned order extracted below:-

"32……………. As clearly brought out in the SCN, there has been common purchase of raw materials. The materials have been purchased even in the names of their employees who were working only for the Noticees and not on their own behalf. It is observed that both the Noticees had received the major raw materials like sugar, maida and packing materials through commission agents but the bills were not directly raised in their names. Glucose Syrup was received from M/s. Punjab Maiza Products, Sangrur in the name of Shri B.P.Sharma working as supervisor in the factory premises of Noticee No.2. The receipt of

raw materials and the other goods was reflected in the daily private/kacha reports which was prepared by the various employees of the Noticee no.1 & 2. Such reports were further submitted to the office of Sh. Montoo who was partner in Noticee No.1 & 3. Likewise Shri Arvind Sharma (Manager), Tek Singh, Gate Keeper & Supervisor of Noticee No.1 and Sh. B.P.Sharma, Supervisor of Noticee No.2 have admitted this fact that they had entered the receipt of the various raw materials in their daily private/kacha reports and were not entered in the statutory records. It was further admitted by them and also Sh.Montoo, Managing Partner of Noticee No.1 that entries in the reports were made on the basis of the actual receipt of the raw materials. Biscuits and sweets were manufactured out of above said unaccounted raw materials. The daily stock/production/clearance accounts were maintained by Sh. Lakhwinder Singh, Supervisor of Noticee No.1 and B.P.Sharma, Supervisor of Noticee No.2. They used to prepare a daily stock report regarding Biscuits and sweets respectively and send the same to the office of Sh. Montoo in the evening. It is thus observed that the manufacturing activities of Noticee Nos.1 and 2 were being carried out and managed in collective manner. No valid distinction could be made and a line drawn between the manufacturing activities of Noticee No.1 and 2. The investigations caused in the matter revealed that the Noticees had been issuing bogus invoices/dispatch slips. The raw materials and packing materials were also accounted for in the same private ledgers and no separate ledgers were maintained in respect of Noticee No.1 and 2. Even the raw materials were transferred sometime from the premises of Noticee No.1 to 2 and vice versa without issuing any document an without giving and receiving any payments. The Biscuits and the sweets manufactured in the factory premises of Noticee no.1 and 2 respectively were also being removed from the factory premises on the same bogus invoices/dispatch slips. So much so goods were also transported to the various stations in the same truck and were delivered by the same deliveryman. The sale proceeds were collected by the same deliveryman and were further handed over to Sh. Montoo and Sh. Jai Prakash who used to make entries in the same ledger and no separate ledgers were *maintained for Noticee No.1 and 2. The expenditure incurred on the sale of the goods were also common for both the units. The payments to the staff of both the units were made by Sh. Jai Prakash and signatures were obtained on the private slips. The sale proceeds were deposited in the six benami accounts maintained in the Oriental Bank of Commerce, Patiala out of which three accounts were operated by Shri Jai Prakash and three accounts by Shri Montoo. The receipts for the dispatches were received through benami accounts as confirmed by the Chief Manager, Oriental Bank of Commerce. All these factors indicate that there was mutuality of interest of each other in the business of the same family. Shri Jai Prakash who was not even a partner in both these units still taking active part and controlling all the affairs being the head of the family. Thus their clearances are required to be clubbed. In view of this I hold that the aggregate value of the clearances of Noticee Nos.1 and 2 have been correctly and legally clubbed together for purpose of demand of duty."*

We find that the adjudicating authority has correctly appreciated the facts and the evidence and therefore uphold the clubbing of clearances of M/s.HBC and M/s.HCW in the impugned order.

25. Taking into account the modus operandi, as elaborated hereinbefore and the outright fraud committed by the appellant with bogus invoices, vitiated account books and benami bank accounts, we find that the penalty has been correctly imposed by the adjudicating authority."

4.4.13 Hon'ble Supreme Court judgment in the case of Satyam Technocast [2015 (322) E.L.T. 789 (S.C.)] held as follow:

"5. *Next issue which concerns us is issue No.VI : - whether clearances of M/s. Satyam Technocast and Pioneer Hardware could be clubbed for the purpose of SSI exemption? The findings on this issue read as under :-*

"M/s. Pioneer Hardware Industries was a partnership firm which was dissolved on 16-7-2001. Shri Somesh Malik was a partner in this firm and was managing its affairs. The firm was dissolved by Dissolution Deed dated 16-7-2001. As per this Dissolution Deed,

the business of M/s. Pioneer Hardware Industries including its assets and liabilities, were to be taken over by Shri Somesh Malik who is also the proprietor of M/s. Satyam Technocast. The evidence on record shows that Shri Somesh Malik continued to raise invoices in the name of M/s. Pioneer Hardware Industries (as are indicated in Annexure 'D' to the SCN) ever after the firm M/s. Pioneer Hardware stood dissolved on 16-7-2001. The details of the sales made by M/s. Satyam Technocast and M/s. Pioneer Hardware Industries were found in the data retrieved from the seized computer. The payments received for supplies by M/s. Pioneer Hardware industries were also reflected in the note books seized from the residence of Shri Somesh S. Malik. M/s. Satya, Technocast manufactured the same product with the same infrastructure as was manufactured by M/s. Pioneer Hardware Industries and M/s. Satyam Technocast merged in such a way during the period relevant to this show cause notice that both these units are inseparable and the clearances made by both these units have to be clubbed on the ground that both these units belong to the same person i.e. Shri Somesh Malik during the relevant period. The facts and figures of this case establish that these units did not have separate legal entity even though M/s. Pioneer Hardware Industries was a partnership firm till 16-7-2001 with Shri Somesh Malik (Proprietor of M/s. Satyam Technocast) evidence ownership interest in the partnership and also managing all its affairs during the period relevant to the instant SCN."

11. The Tribunal vide the impugned judgment dated 11-3-2004 [2004 (176) E.L.T. 235 (Tribunal)] has set aside the order of the Commissioner. On going through the order of the Tribunal we find that the prime reason given by the Tribunal in support of its order is that there is hardly any evidence on record to prove the allegations made against the two respondents herein. We find this to be totally erroneous. We have already reproduced the material which was relied upon by the Commissioner in his order. It is for this reason that some of the discussion from the order of the Commissioner is extracted as well. Faced with the aforesaid position, Mr. L. Kumaran argued that the Commissioner was not entirely correct in his approach. Though it *was found that two firms, namely, Alpa Hardware and Alpa Watch Industries were dummy but while calculating the amount payable, it has included the value of the job work which was got done from the other firms as well. Some of the other firms were totally independent and even the show-cause notice or the order of the Commissioner does not point out anything about the same. The Commissioner has included the value of job work which is got done from such outsiders only on the ground that the respondents firms could not produce any document which could not give any particulars of the jobs that were got done from the said parties."*

4.5.1 Appellants have challenged the impugned order on the ground that show cause notice in the present case has been issued only to Appellant 1, the two units which have been said to be dummy were not made party to the show cause notice. For this they have relied upon the following decisions:

- Alpha Toyo Ltd. [1994 (71) ELT 689(T)]: The issue considered by the tribunal in this case as stated in para 1 of the said decision is as follows:

  "In these set of appeals, a common question of law and facts arises, hence they are taken up together for disposal as per law. The short question that arises for our consideration in these appeals is as to whether the clearances of all the five units can be clubbed on the basis of interest free loan granted by the M/s. Alpha Toyo Ltd. to other four units and also in view of similar financial assistance among the other four units, notwithstanding the fact that all the five units are independently incorporated with separate licences viz. L-4 licence, ST and IT registration and having independent functioning in all respects of setting up of machinery, manufacture, labour, telephone, sales, purchase and other aspects of the managements."

  The issue for which the appellants rely upon this decision was not an issue before the tribunal in this case and hence is distinguishable.

- Ogesh Industries [1997 (94) ELT 88 (T)]

The first argument advanced by Shri Gujral, ld. Advocate, was that M/s. Gore Industries were a separate corporate entity from M/s. Ogesh Industries. He has shown that in his order, the Dy. Collector has observed that he had no reason to disbelieve that these two corporate entities were separate and distinct. It is his claim that no Panchnama was conducted in the premises of M/s. Gore Industries. In the absence of Panchnama, there was no basis to the observation of the Dy. Collector that the officers on a visit, found no machines, no raw materials or other evidence to establish that no manufacture could be undertaken therein. He submitted that the attendance records would show that there were 7 workers working in the factory of M/s. Gore Industries. He stated that the work of pressing the sheets in the form of locks was done by hand. Other operations were got done on job work basis from M/s. Ogesh as well as from other concerns, referred in the statement of Shri Raizada, partner of M/s. Gore Industries. He stated that when at all times, the existence of Gore Industries separately from Ogesh Industries was projected, the department should have issued a show cause notice to M/s. Gore Industries. The decisions arrived at on the basis of a show cause notice sent to M/s. Ogesh Industries alone, are patently violate all the principles of natural justice. We find the various claims made by Shri Gujral to be correct. A show cause notice had to be issued to M/s. Gore Industries. Thereafter the adjudicating authority could go into the question whether the two units were really independent or whether one was a dummy unit of another. But he could not pre-determine the issue and limit the show cause notice only to that unit which he considered to be the only real unit. As per the statements of S/Shri Raizada and Verma, the partners in the two units, there was movement of goods in process from M/s. Gore Industries to M/s. Ogesh Industries for completion of certain manufacturing processes. The failure to issue the show cause notice to one of them would show non-application of mind on part of the authorities. As a *consequence, the show cause notice must be held to be bad in law.*

From the above it is evident that this is a case wherein their both the units had a separate corporate entity. However from the examination of evidences on record in the present case nothing has been found at the material time when the goods were cleared. All the documents which have been produced showing registration with various authorities are dated much after the time of clearance. If these separate units came into existence they had come into existence much later. A fact which has been admitted in the statements recorded. Hence this decision is distinguishable.

- Ramsay Pharma [2001 (127) ELT 789 (T)] Para 1 of the order reads as follows:

  "The above appeal arises out of the order of the Commissioner of Central Excise, Allahabad who has confirmed a duty demand of Rs. 21,21,385/- upon the appellants herein who are manufacturers of PP medicines falling under CET Sub-heading 3003.10, by denying them the benefit of SSI Notification 175/86 dated 1-3-1986 as amended and Notification 1/93 dated 28-2-1993 as amended, holding that the appellants are owned and controlled by another Company viz. Shree Baidyanath Ayurved Bhawan Ltd., Naini, carrying on the same business of manufacturing and selling allopathic as well as ayurvedic medicines falling under CET Sub-headings 3003.10 and 3003.30 respectively, and has imposed a penalty of Rs. 21 lakhs upon the appellants."

  From the facts as stated above we find that the issue involved in the present appeal is in relation to denial of exemption under Notification 175/86-CE and Notification No 1/93-CE for the reason that the unit which claimed exemption was under control of some other unit. Issue considered by the tribunal in this order is not the issue before us. Hence distinguishable.

- K.R. Balachandran [2003 (151) ELT 68 (T)]

14. ……..The Rama Industries has been separately located with separate lease deed and unit has been manufacturing different items namely LPG domestic gas stoves while Meera Industries had been manufacturing domestic pressure cookers and pans. The item being different the brand name is also different and the evidence on record here shows that Meera Industries could not have used the brand name of Rama Industries as the product of the Rama Industries is different. Be that as it may it is fundamental principles of natural justice that when these enormous evidences were examined at the time of inspection and the department was aware of the existence of Rama Industries then it was incumbent to have put the Rama Industries to notice. The violation of issue of show cause notice to Rama Industries has vitiated the proceedings. However we notice that the department in the show cause notice had alleged that Meera Industries were using brand name of Rama Industries and made themselves ineligible for the benefit of notification, while the Commissioner in the impugned order has proceeded to hold besides holding that Rama Industries is only on paper and a deemed unit and has also held flow back of funds between both the units. There is a clear contradiction in the finding of the Commissioner. Therefore, all the more it was incumbent for the department to have issued show cause notice to Rama Industries which had an independent existence with separate partners. None issue of show cause notice to Rama Industries and also for the reasons that department has taken different stand on the status of Rama Industries therefore the proceedings have become bad in law we are constrained to set aside the impugned order on this ground above in the light of the judgments relied by the ld. Counsel in the case of CCE v. Madan Lal; CCE v. Supreme Electrical Appliances and Dawn Fire Works v. CCE (supra).

15.*We are also agreeable with the ld. Counsel's argument that the department was fully aware of the existence of the Rama Industries and that it had been* *receiving RT 12 returns and Rama Industries was maintaining separate registration under various legislation and their registration have been checked by the Inspectors, Superintendents and Assistant Commissioners of Central Excise. Therefore it follows that the department had full knowledge of the existence of Rama Industries and in that view of the matter, suppression of facts for invoking larger period is not sustainable and the demands are time-barred and requires to be set aside on this ground also. In view of the fact that the department has not issued show cause notice to Rama Industries and has proceeded to hold that Meera and Rama Industries to be one and the same and also that Meera Industries has used the brand name of Rama Industries making them ineligible for SSI exemption is bad in law. Therefore, on this ground alone the impugned order is set aside and appeal allowed besides the other ground of time-bar and also for insufficiency of evidence to uphold the charges of evasion of duty in the matter."*

From the above it is quite evident that facts are clearly distinguishable from the facts of the present case.

- Copier Force Vs. CCE [2008 (231) ELT 224 (T)]

"9.6 However, we find that no show cause notices were issued to the dummy units floated by CFI. In the light of the ratio of following case law cited by the appellants, the demand on CFI is bad in law as regards demand on photocopiers relatable to the dummies in the absence of show cause notices issued to the dummy units. In the case law it has been held that non-issuance of show cause notice to the alleged dummy units proposing clubbing with the principal unit would vitiate the proceedings, per se. The following are the case law cited by the appellants :

1. *1. SKN Gas Appliances v. CCE - 2000 (120) E.L.T. 732*
2. *2. Ramsay Pharma Pvt. Ltd. v. CCE - 2001 (127) E.L.T. 789*
3. *3. Ogesh Industries v. CCE - 1997 (94) E.L.T. 88*
4. *4. CCE v. Sethia Foods - 2003 (156) E.L.T. 395*

5. 5. Dawn Fireworks Factory & Ors. v. CCE - 1999 (31) RLT 104

6. 6. CCE v. Maganlal Nandlal & Sons - 1999 (113) E.L.T. 597

7. 7. K.R. Balachandran v. Commr. - 2003 (151) E.L.T. 68

8. 8. Velmurugan Engg. v. CCE - 2005 (187) E.L.T. 371

9. 9. Poly Resins v. CCE [2003 (161) E.L.T. 1136

Vide the Tribunal's decision in the case of CCE v. Sethia Foods (supra), it has been held that when show cause notice is not issued to the dummy unit, clubbing is not permissible. Therefore the demand of duty from CFI and related penalties are not sustainable to the extent it relates to photocopiers relatable to dummy units."

4.5.2 From the paragraphs of show cause notice referred in para 2 it is apparent that the Show cause notice has been issued to the partners of the said dummy units, for imposition of penalty. The duty that has been short paid would be demanded from the person who has actually undertaken the activity of manufacturing and clearance of the goods – who in the present case is Appellant 1. It is not the case were the dummy unit were not put to notice. Partners in the dummy units were part of the proceedings and they had complete opportunity to plead their case in response to show cause notice. As per the Section 18 of the Partnership Act, 1932, a partner is the agent of the firm and issuance of a notice to a partner is as good as issuing the notice to the firm. Thus the issuance of the show cause notice to partners has not caused any prejudice to any of the four noticee or the present three appellants. Appellants all along had knowledge as to what case they were required to meet during adjudication and they have not shown that they were in any way misled into taking their defence or were prejudiced by not issuing the notice in the name of firm.

4.5.3 CESTAT in the case of V.K. Thampi [1988 (33) E.L.T. 424 (Tribunal)] observed

***9.** ……. Even under the Partnership Act, a notice to a partner who habitually acts in the business of the firm of any matter* *relating to the affairs of the firm operates as notice to the firm. It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or, in other words, the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings. …"*

4.5.4 Hon'ble Supreme Court in the case of Madhu @ C.V. Maadhesh (2002 (146) E.L.T. 252 (S.C.)] held

"6.*Inasmuch as a show cause notice has been issued to both M/s. Komalagowre Textiles and M/s. Selvaganapathy Textiles, we fail to understand as to how any prejudice is caused to either of the parties. At the stage of issuance of show cause notice, particularly when the view of the Department is that one firm is a fictitious business firm or a dummy of the other, it would be easier and more appropriate to examine the matter together. Therefore, it was not necessary to split up the show cause notice in respect of M/s. Komalagowre Textiles and M/s. Selvaganapathy Textiles. However, if appropriate objections are raised before the authorities concerned, the same may be examined and, if necessary, separate proceedings may be held in regard to M/s. Komalagowre Textiles and M/s. Selvaganapathy Textiles."*

4.5.5 Following the above case of Hon'ble Supreme Court tribunal has in the case of Shri M Gunasekaran Vs CCE, Madurai [2010 (253) E.L.T. 632 (Tri. - Chennai) held

"Viewed in the light of the Hon'ble Supreme Court decision cited above, the show cause notice issued jointly to both the units in this case does not appear to suffer from any infirmity. At the stage of issuing the show cause notice, it was the department's view that SGE was a fictitious dummy unit, the proposal to club the clearances of both the units was contained in the joint notice and both the units were put on notice and both the units subsequently represented their cases before the adjudicating authority. As held by the Hon'ble Supreme Court in the case cited above, it was more appropriate to examine the matter together in this case which has been done by the department. There was a proposal to penalize SGE which has been dropped by the adjudicating authority and the said unit has no grievance.

The objection raised by the appellants herein i.e., SLI that SGE was not separately asked in the show cause notice why the clearances shown in SGE's name should not be clubbed with that of SLI is at the most a mere technical objection and in any case there is no prejudice caused to SLI since they were specifically put on notice regarding clubbing of the clearances."

4.5.6 In Alpha Converting Machines Pvt Ltd [2018 (384) ELT 141 (T-Ahmd)] tribunal observed:

"14. *Ld. AR had argued that demand can only be confirmed against the entity which is not dummy entity as held by Hon'ble Apex Court. He argued that in these circumstances, issue of SCN to all entities would be of no avail. He further argued that all 3 entities were represented by Sh. Rajan David and thus there was no violation of principles of natural justice as notice was issued to Sh. Rajan David. We find force in the argument of Ld. AR. The entire argument of Revenue is based on the fact that only one entity has factory/machines and other two are creations on paper to avoid payment of tax. In these circumstances, recognition of separate existence by issue to SCN would have run counter to the allegation that they are dummy. Moreover, we find opportunity was given to Sh. Rajan David to defend and he was authorized signatory of all entities. In these circumstances, we do not find any merit in appeal and the same is dismissed."*

4.8.7 Hon'ble Delhi High Court in the case of ITC Ltd. [2014 (036) STR 0481 (Del.)] held that:

*"**17.** When we examine the Show Cause Notice, we have to take into consideration that the object and purpose is to inform the recipient of the allegations against him so that he can meet them effectively and is not prejudiced by manifestly vague notice which leaves him confused and unable to answer/reply. The assessee must be given a reasonable and real opportunity and made aware as to what he has to meet. But, the notice cannot be read as a legislative enactment which is to the point, precise and required to show exceptional lucidity. What is required to be seen is whether the allegations made have been conveyed and set forth, to enable the recipient/assessee to get an opportunity to defend himself against the charges. Notice should not suffer*

from obscurity and unintelligibility as to deny a fair and adequate chance to the recipient/assessee to get himself fully exonerated and avoid incidence of tax. What transpired after the notice was served, conduct of the parties thereafter, hearing given, are all factors that have to be examined to ascertain as to any prejudice was caused resulting in an arbitrary and unjust decision. Principle of prejudice resulting from vagueness and uncertainty has to be examined in pragmatic and a reasonable manner.

4.5.7 Hon'ble Allahabad High Court in the case of Raghunath International Ltd. [2011 (266) E.L.T. 432 (All.)] held that:

"23. *Apart from above, the Assessee had full knowledge of the ingredients as well as the evidence. No prejudice has been caused. Even before us, nothing has been brought to our notice to show that any prejudice was caused. The notice and the orders cannot be set aside merely for the reason that the contravened sub-rule was not mentioned.*

24. *In our opinion, as no prejudice was caused—the impugned orders cannot be set aside."*

4.5.8 In view of the above we do not find any prejudice being caused to the Appellants in the present case in making their defence in the matter. In absence of any such prejudice to appellants we do not find any merits in the objection raised by the appellants.

4.6.1 The classification lists in respect of the dummy units viz. M/s SRC and M/S ET were approved finally in 2011 based on Order-in-Original No.42/CEX/2001 dated 09/01/2002 and these orders were remanded by the Commissioner (Appeals) vide two separate OIAS both dated 30/3/2012 with a direction to follow the principles of natural justice.

4.6.2 As per Rule 2(a) of General Rules for interpretation of Central Excise Tariff Act, 1985

"2(a) Any reference in a heading to goods shall be taken to include a reference to those goods incomplete or unfinished, provided that, the incomplete or unfinished goods have the essential character of the complete or finished goods. It shall also be taken to include a reference to those goods complete or

finished (or falling to be classified as complete or finished by virtue of this rule), removed unassembled or disassembled."

4.6.2 The Appellants claim that when air conditioning plants not capable of being taken to market and sold as such and transportable only in dismantled condition, air conditioning system as whole not dutiable. They relied upon two case laws viz. Blue Star Ltd. v. Commissioner (2002 (143) E.L.T. 391 (Tribunal)] and Carrier Aircon Ltd. v. Commissioner [2003 (154) E.L.T. 710 (Tribunal)].

4.6.3 The Appellants admittedly manufacture only Split Air Conditioners and themselves classified under Ch. heading 8512 of Schedule to C.Ex. Tariff Act, 1985. They had cleared these goods under C.Ex. invoices as stated in earlier paras. When a marketable commodity such as Split Air Conditioner comes into existence by assembling various components that go into its making, "excisable goods" come into existence and the mere fact that such goods are subsequently fixed on a foundation that will not remove them from the category of excisable goods in which they fell before being so fixed. In the case of Makson Pharmaceuticals (I) Ltd. v. Commissioner [2006 (202) E.L.T. 129 (Tribunal)] tribunal observed –

"7. It is clear from the facts on record that before the water treatment plant could be fixed on the foundation, it was required to be assembled, so that it could function as a water treatment plant. This is why all the required components etc. were purchased by the appellant so that they could be assembled into a water treatment plant, which was a marketable commodity. It could not only be fixed on a foundation, but could also be removed by retaining its character as a water treatment plant. When a marketable commodity such as water treatment plant comes into existence by assembling various components that go into its making, "excisable goods" come into existence and the mere fact that such goods are subsequently fixed on a foundation that will not remove them from the category of excisable goods in which they fell before being so fixed. This issue has been settled by the Larger Bench in Mahindra & Mahindra Ltd. v. CCE reported in 2005 (190) E.L.T. 301 (Tribunal-Larger Bench)."

4.6.4 Proforma invoices cum gate passes issue under Rules 52A and 173G the name of the excisable commodity shown as "SPLIT TYPE AIRCONDITIONING PACKAGE UNITS". Application of Rule 2(a) will arise, when the parts comprising of a machine are supplied/presented together. Relying on the Hon'ble Supreme Court judgment in the case of Salora International Ltd. [(2012 (284) E.L.T. 3 (S.C.)], Hon'ble Tribunal in the case of Salora International Ltd. [2018 (12) G.S.T.L. 173 (Tri. - Del.)] held-

8. *The appellants pleaded that the facts have changed from 1994-1995 onwards due to availability of technology for testing the components and parts of television without actually assembling them to a full television set. We find that this alone cannot be the basis for not applying the ratio of decision of Apex Court in the appellant's case for the earlier period. Admittedly all the components and parts and chassis are numbered and are cleared with a required set of screws and name labels of the manufacturer. All the parts and components were numbered for a particular TV set and have clear identifiability which as observed by Apex Court will take away the goods from the classification as "parts". They will be classified as identifiable television receivers only. One more important aspect which adds to the strength of the case for Revenue is that the very same materials were cleared by the appellant for export classifying the same as television receivers under CETH 8528. They have claimed higher export benefits. When these items are cleared for their other satellite units for final assembling and marketing they have claimed classification as parts. Such dual approach for the same set of items is not tenable. This clearly strengthens the case of the Revenue for classification under CETH 8528.*

9. *We note that the impugned order dated 4-3-2014 covering the period 1-4-2002 to 30-4-2003, examined this issue in great detail. It is recorded that the show cause notice specifically brought out the fact that CTV sub-assembly and CTV chassis were actually a complete TV sets in unassembled/disassembled form and also that they have all the essential characteristics of a complete CTV. The application of Rule 2(a) for interpretation of excise tariff was also examined by the lower authority. The appellants had all the facilities of manufacture which included* *numbering, matching, assembling and testing within their factory premises. On careful consideration of the impugned orders, we are of the considered view that the ratio of the Apex Court in the appellant's own case regarding classification of the impugned goods shall apply in these cases also. Accordingly, we uphold the classification of the impugned goods under CETH 8528 of the Tariff.*

4.6.5 The Tribunal has in the case of Vardhman Acrylics Ltd. [2002 (146) E.L.T. 604 (Tri. - Del.)] held

"8.*We have seen the expert opinion. The expert opinion only indicate that the cloth could be used as a filter. However, use of the cloth is not determinant for classification of the product. The product is normally classified in the form it is presented for clearance. In the instant case at the time of clearance of these imported goods, the goods were 100% cotton cloth in running length and therefore, they have been rightly classified under Chapter Heading 52.08."*

4.7.1 The Appellants claim that Rule 173Q(2) was omitted w.e.f. 12/5/2000 and therefore any order passed after 12/5/2000 invoking confiscation under Rule 173Q(2) is not sustainable and for this they have relied upon the decision in the case of in Punjab National Bank [2022 (2) TMI 1171 Supreme Court}. In case of Punjab National Bank Vs. VOI – 2022 (2) TMI 1171 - SUPREME COURT has held that

"36. In the case at hand, the proceedings initiated under the erstwhile Rule 173Q(2) would come to an end on the repeal of the said Rule 173Q(2) of the Central Excise Rules, 1944. Respondent Counsel's submission that the proceedings would be saved on account of Section 38A(C) and 38A(e) of the Central Excise Act, 1944 and Section 6 of the General Clauses Act, 1897, is misplaced and lacks statutory backing. Firstly, as has been held by a Constitution Bench of this Court in Kolhapur Canesugar Works Ltd. Vs Union of India & Ors. [(2000) 2 SCC 536], Section 6 of the General Clauses Act, 1897 is applicable where any Central Act or Regulation made after commencement of the General Clauses Act repeals any enactment. It is not applicable in the case of omission of a "Rule". Hence, the question of applicability of Section 6 is decided in the negative. Secondly, on the issue of applicability of Section 38A(c) and 38A(e) of the Central Excise Act, 1944, it is held that the Respondent would not be able to enjoy its protection because Section 38A(c) and 38A(e) are attracted only when "unless a different intention appears". In the present case, the legislature has clarified its intent to not restore/revive the power of confiscation of any land, building, plant machinery etc., after omission of the provisions contained in Rule 173Q(2) w.e.f 12.05.2000. This intention of the legislature can be drawn out from the fact that power to confiscate any land, building, plant, machinery etc. after omission w.e.f. 12.05.2000 has not been introduced in the subsequent Central Excise Rules, 2001, Central Excise Rules, 2002 and Central Excise Rules, 2017. Additionally, this intent is also fortified by the fact that Rule 211 of the Central Excise Rules, 1944, inter alia, provided that "anything" confiscated under the Rules shall thereupon vest in Central Government, whereas Rule 28 of the Central Excise Rules of 2001, 2002 and 2017, which are pari materia to the earlier Rule 211 of the 1944 Rules, instead of the word "anything', provided for vesting of confiscated "Goods" in the Central Government. Lastly, after omission of Rule 173Q(2) of 1944 Rules w.e.f. 12.05.2000 and after supersession of Rule 211 of 1944 Rules in the year 2001, the newly enacted Rule 28 of the Rules of 2001, Rule 28 of the Rules of 2002 and Rule 28 of the Rules of 2017, did not provide for confiscation of any land, building, plant, machinery etc. and their consequent vesting in the Central Government, as Rule 28 only provided for vesting in the Central Government of the "Goods" confiscated by the Central Excise Authorities under the Excise Act, 1944. This derivation of the legislature's intent, in conjunction with the ratio laid in the case of Kotak Mahindra Bank (supra) makes it apparent that the confiscation proceedings were not saved by these mentioned provisions and that the final confiscation order dated 26.03.2007 and 29.03.2007 were passed without jurisdiction by the Commissioner of Central Excise and Customs."

4.7.2 In view of the above decision of the Hon'ble Apex Court, we are not in position to sustain the impugned order to the extent of confiscation made under Rule 173 Q (2) of the erstwhile Central Excise Rules, 1944

4.8.1 Appellants have challenged the penalty imposed upon them under Rule 173 Q and 209 A relying on various case laws. However these case laws were distinguished by the tribunal in case of Mahindra vs Mahindra [2014 (312) ELT 545 (T)] stating as follows:

"17.1 It is the contention of the appellant that since Notification No. 31/2000 was validated by aforesaid provisions of Finance Act, 2009, penalty could not be imposed on the appellants for the period prior to 2009 and they have relied on the judgments of this Tribunal in the case of Chemo Pulp Tissues v. CC reported in 2000 (119) E.L.T. 715 (T-LB) and CCE v. Ranga Vilas GS & W Mills, 2002 (149) E.L.T. 742 (T-LB). The case laws relied upon by the appellant pertain to a totally different situation altogether. In the Chemo Pulp Tissues and Ranga Vilas cases cited supra, the facts are altogether different. Vide clause (1) of Section 112 of the Finance Act, 2000, it was provided that no credit of any duty paid on high speed diesel oil shall be deemed admissible during the period from 16-3-1995 to the date on which the said Finance Act, 2000 received Presidential assent. An explanation was provided in Section 112 for non-imposition of penalty in case the credit has been taken wrongly prior to Finance Act, 2000 coming into force. If anybody had taken the credit wrongly, then they were not eligible for the same. However, taking of such inadmissible credit was not made punishable if the credit had been taken prior to the coming into force of Finance Act, 2000. In other words, in those cases there was a doubt or dispute regarding admissibility of Cenvat credit and if anybody had taken the credit wrongly, the credit was not admissible and had to be reversed; however, such availment of credit was held to be non-punishable, in view of the dispute involved. The facts in the present case are different and distinguishable. Rule 9 of the Customs Valuation Rules, 1988 existed in the statute from 1988 onwards, and the said rule provided for inclusion of costs and services incurred, if any, in the transaction value of the goods imported, if such costs and services were relatable to the manufacture of the imported goods and such costs and services

were incurred in a place other than India. The said Rule 9 was very much in existence at the time of importation of the goods in the instant case and it has not been amended in any manner, with retrospective effect. If any importer did not include the costs and services as provided for under Rule 9, then non-inclusion would have attracted penal action under Sections 111 and 112 of the Customs Act, irrespective of who issued the show cause notice. It is not the issue of show cause notice which determines the liability to penalty. Liability to penalty arises if the goods are liable to confiscation under Section 111. None of these sections has been amended in any way with retrospective effect so as to bring in its purview misdeclaration of value as a punishable offence under the aforesaid sections. In the instant case what has been validated by the Finance Act, 2009 is the action taken by DGCEI officers in respect of issue of show cause notices for Customs violations. This has nothing to do with the confiscability of the goods, if they had been imported in violation of the provisions of Customs Act. Therefore, in the instant case, the penalty has been rightly imposed under Section 112(a) by the adjudicating authority for misdeclaration of value and consequent evasion of customs duty by deliberately suppressing material facts. The appellant has also made a point that penalty cannot be exceed 25% of the duty liability. In the instant case, the penalty imposed is only Rs. 1.5 crore and the duty liability, which is confirmed is Rs. 7,78,66,696/-. Thus, the penalty imposed is less than 25% of the duty liability confirmed. Therefore, we do not find any merit in the contentions raised by the appellant and the same are rejected."

4.7.2 The Rule 173 Q (1) and Rule 209 A is made in terms of Section 37 (4) and 37 (5) of the Central Excise Act, 1944 and it provided as follows:

"(4) Notwithstanding anything contained in sub-section (3), and without prejudice to the provisions of section 9, in making rules under this section, the Central Government may provide that if any manufacturer, producer or licensee of a ware house -

(a) removes any excisable goods in contravention of the provisions of any such rule, or

(b) does not account for all such goods manufactured, produced or stored by him, or

(c) engages in the manufacture, production or storage of such goods without having applied for the registration required under section 6, or

(d) contravenes the provisions of any such rule with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the manufacturer, producer or licensee shall be liable to a penalty not exceeding the duty leviable on such goods or five thousand rupees, whichever is greater;

(5) Notwithstanding anything contained in sub-section (3), the Central Government may make rules to provide for the imposition upon any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under this Act or the rules made thereunder , a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater."

Rule 173 Q (1) and 209 A of the Central Excise Rules,1944 read as follows:

"Rule 173 Q …

(1) Subject to the provisions contained in section 11AC of the Act and rule 57AH, if any manufacturer, producer, registered person of a warehouse or a registered dealer,-

(a) removes any excisable goods in contravention of any of the provisions of these rules; or

(b) does not account for any excisable goods manufactured, produced or stored by him; or

(bb) takes credit of duty or money in respect of inputs or capital goods for being used in the manufacture of final products or capital goods for use in the factory of the manufacturer of

final product, as the case may be, wrongly or without taking reasonable steps to ensure that appropriate duty on the said inputs or capital goods has been paid as indicated in the invoice or any other document approved under these rules evidencing the payment of excise duty or the countervailing duty, as the case may be, accompanying thereof, or takes credit of duty or money which he knows or which he has reason to believe, is not permissible under these rules, or does not utilise the inputs or capital goods in the manner provided for in these rules, or utilises credit of duty or money in respect of inputs or capital goods in contravention of any of the provisions of these rules, or does not render proper and true account of the receipt and disposal of the said inputs or capital goods and the credit of duty or money taken thereon as required under these rules, or contravenes any of the provisions contained in Section AA or AAA of Chapter V of these rules; or

(bbb) enters wilfully any wrong or incorrect particulars in the invoice issued for the excisable goods dealt by him with intent to facilitate the buyer to avail of credit of the duty of excise or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975) in respect of such goods which is not permissible under these rules; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the manufacturer, producer, registered person of a warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (bb) or clause (c) or clause (d) has been committed, or ten thousand rupees, whichever is greater. "

Rule 209 A of the Central Excise Rules,1 944 read as follows

209A. Penalty for certain offences-

Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or ten thousand rupees, whichever is greater.

The Central Excise Rules 1944 were superseded by the Central Excise Rules, 2001 by the Notification No 9/2001-CE NT dated 1st March 2001. The preamble to the this notification read as follows:

"In exercise of the powers conferred by section 37 of the Central Excise Act, 1944 (1 of 1944) and in supersession of the Central Excise Rules, 1944, except as respect things done or omitted to be done before such supersession, the Central Government hereby makes the following rules, namely:-

Rule 25 of the Central Excise Rules, 2001 read as follows:

"25. Confiscation and penalty.-

(1) Subject to the provisions of section 11 AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer, -

(a) removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or

(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty,-

then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse or a registered dealer , as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect *of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or rupees ten thousand, whichever is greater.*

26. Penalty for certain offences.-

Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or rupees ten thousand, whichever is greater.

The 2001 rules were thereafter superseded by the Central Excise Rules, 2002 by the Notification No 4/2002-CE NT dated 1st March 2002. The preamble to the this notification read as follows:

"In exercise of the powers conferred by section 37 of the Central Excise Act, 1944 (1 of 1944) and in supersession of the Central Excise (No. 2) Rules, 2001, except as respects things done or omitted to be done before such supersession, the Central Government hereby makes the following rules, namely:-"

Same rules was carried forward in the Central Excise Rules, 2002 as Rule 25 and 26.

However in 2002 Rules, Rule 33

"Transitional provision.- Any notification, circular, instruction, standing order, trade notice or other order issued under the Central Excise (No. 2) Rules,2001 by the Board, the Chief Commissioner or the Commissioner of Central Excise, and in force as on the 28th day of February, 2002, shall, to the extent it is relevant and consistent with these rules, be deemed to be valid and issued under the corresponding provisions of these rules."

4.7.3 Thus it is seen that the Rule 173 Q (1) and Rule 209A made in terms of rule making powers conferred under Section 37 (4) and 37 (5) of the Central Excise Act, 1944 continued to be there in the Central Excise Rules, 2001, and Central Excise Rules, 2002 as Rule 25 and Rule 26. Since these rules were not omitted but carried forward in the new rules the decision of the

Hon'ble Supreme Court in case of PNB, cannot be applied to the penalties imposed in terms of Rule 173 Q (1) and 209A.

4.7.4 In case of Castrol India Ltd. [2008 (222) ELT 408 (T)] following has been held:

"20. *As regards imposition of penalty …. under Rule 209A, we find that penalty can be imposed under Rule 209A only if it is found that the concerned persons have dealt with the goods in any manner which they knew are liable to confiscation and in this case no goods have been held liable to confiscation and accordingly penalty under Rule 209A on these appellants cannot be sustained and is accordingly set aside."*

In the present case we find that the appellant 2 and appellant 3 were directly responsible for removing of the excisable goods without payment of the duty as is evident from the impugned order and Commissioner has specifically referred to the statements of Shri Jayant Shirwadkar and Shri Shrikant Shirwadkar stating as follows:

a. Shri Jayant Shirwadkar, Partner of M/s SRC in his statement dated 18/2/1995 (where he signed as Accounts Executive for M/s UCSSPL) admitted that they were having a unit in Bhosari viz. M/s Ultramatrix Systems Pvt. Ltd. engaged in manufacture, installation & commissioning of air-conditioning package units and stated

"...We were not sure whether we should carry out the business in UCSSPL or USPL as collaborators agreement and the other things were uncertain. In 1994, after Budget, we were not sure on which company the collaboration to be entered and in which company /unit as the activities to be conducted after collaboration. This was because of there was drastic change in excise structure. We started planning to form partnership company namely M/s Shrikant Refrigeration Co. having partners Mrs. H.$. Shirwadker and Mr. Jayant Shirwadkar and M/s Excel Tech. Corp. having partners Mrs. Anjali Shirwadkar and Mrs. I.A. Shirwadkar for manufacturing of same activities. We got these registrations in the same shed. The premises 142/1, Near Parmar Indl. Complex, Chinchwad having

compartments where these two companies started functioning independently." He also stated that

a. *After the Budget got declared, we were not sure where air-conditioning activity should be classified. Our major assembly goes at the site, so we started clearing the goods under parts and accessories of the air conditioning units.*
b. *Secondly, as our bankers were also not ready to finance to M/s Ultramatrix Computer Support Systems Pvt. Ltd. we decided that we should now manufacture/assemble the units in Shrikant Ref. Co and Excel Technology Corpn. 3 Considering production, execution urgencies we started operating in these two companies. We have executed these orders with shortage of funds.*
c. *We were under the impression that these two companies should avail the benefit and accordingly we prepared the invoices and challans.*
d. *These 14 units were cleared to UCSSPL, which in turn had cleared to MTNL.*
e. ***Since there was term in contract that 30% excise duty will be paid by UCSSPL which was paid by MTNL. However we were under the bona-fide belief that since these activity of manufacturing has been carried out in Excel Technology Corporation and Shrikant Refrigeration Co. the same was not paid to the Government.***

b. *Shri Shrikant Shirwadkar, Director UCSSPL, in his statement dated 1/10/1996 admitted that they did not receive any consideration from M/s SRC and M/s ET for labour force and machinery utilized by these floated units belonging to M/s UCSSPL as there was no separate labour force and machinery belonging to M/s SRC and M/s ET. in his statement recorded on 5/5/1995 Shri Shrikant Shirwadkar further deposed that M/s SRC and M/ş ET manufactured air-conditioning systems which were cleared to M/s UCSSPL who in turn sold these systems to their end customers. Also payments were received by M/s UCSSPL* *from the end customers and M/s UCSSPL made payments to M/s SRC and M/S ET on cash basis throughout the year. He further informed that raw material payments were made directly by M/S UCSSPL.*

c. *Shri Dilip Yendole, accountant and authorized signatory of M/s SRC in his statement dated 6/4/1995 stated that M/S SRC manufactured and cleared 7 Air-conditioning Systems to M/s UCSSPL.*
d. *Shri Dilip Yendole, accountant and authorized signatory of M/s SRC in his statement dated 17/2/1995 stated that "we are pasting stickers which contains wordings "MADE IN INDIA BY ULTRAMATRIX IN TECHNICAL COLLABORATION With R.C. CONDIZIONATORY -ITALY". He also stated that the stickers 'ULTRAMATRIX' are affixed on the goods manufactured and cleared by these units. In view of explanation III inserted in Notification No.75/87-CE dtd. 1.03.1987 vide Notification No. 11/94-CE dated 1.3.1994 exemption contained in this notification shall not apply to the specified goods bearing brand name, symbol, monogram,"*

From the above statements it is clear that the Appellant 2 and Appellant 3 admitted to their role in the alleged activities for evading the central excise duty they also admitted the fact that they were collecting the duty @ 30 % on the value of goods supplied to their Customers as Central Excise Duty as per the contract, but were not paying the same to government account. Hence we do not have any hesitation in holding that the both Shri Shrikant Shiwadkar and Shri Jayant Shiwadkar were in complete knowledge of the things in relation to clearance of these goods without payment of duty. These goods which have been cleared without payment of duty are liable for confiscation and hence penalties under Rule 2009A is justifiable and cannot be faulted with.

4.7.5 It is also noted from the para 3.3 of the impugned order that the in the first round of litigation Commissioner has vide his order in original No 42/CEX/2001 dated 09.01.2002 adjudicated the show cause notice holding as follows:

"3.3 In view of the above findings, the then Commissioner of Central Excise Pune I Commissionerate dropped the proposed duty demand of Rs 18,44,400/- demanded on clearances effected by M/s UCSSPL during the period covered in the classification list approved by the jurisdictional Asst. Commissioner. However he confirmed the demand of Rs 18,00,000/- being duty on the combined clearances of 14 AC systems, manufactured and cleared in tandem by the three units under Section 11A of the Act read with Rule 9 (2) of the Rules. He imposed penalty of Rs 1,80,000/- under Rule 173 Q of the Rules on M/s UCSSPL. Personal Penalty of Rs 50,000/- on Shri Shrikant Shirwadkar, Director of M/s UCSSPL under Rule 209A of the Rules and order confiscation of plant, machinery, material etc. of M/s UCSSPL, under Rule 173 Q (1) of the Rules, which was ordered to be released on RF of Rs 50,000/- in lieu of confiscation."

It is also not in dispute that the no appeal against this order dated 09.01.2002 was filed by the revenue and other co-noticee in the show cause notice i.e. Shri Jayant Shirwadkar and Mrs H S Shirwadkar. In result the proceedings against these two co-noticees have become final and cannot be reopened by the Commissioner in de-novo proceedings as per the order of tribunal remanding the matter back to original authority in the appeals filed by M/s UCSSPL and Shri Shrikant Shirwadkar. Also in absence of the appeal by revenue against this order the order has acquired finality and Commissioner cannot have passed any order beyond the order passed by his predecessor. In view of this fact in our view the Commissioner order imposing penalty on Shri Jayant Shirwadkar cannot be sustained and the penalty imposed on Shri Shrikant Shirwadkar cannot be in excess of the penalty imposed by this order. Thus in our view

- Appeal filed by the Appellant 1 against the imposition of penalty under Rule 173 Q (1) is partly allowed to the extent of restricting the penalty imposed under this Rule to Rs 1,80,000/-
- Appeal filed by Shri Jayant Shirwadkar (Appellant 2) against the penalty imposed by the Commissioner in this remand proceedings needs to be allowed.

- the appeal filed by Shri Shrikant Shirwadkar (Appellant 3) against penalty imposed under Rule 209A also is allowed partly restricting the penalty imposed under Rule 209A on him to Rs 50,000/-

5.1 Appeal by the Appellant 1 is partly allowed modifying the impugned order to the extent of

- reducing the penalty imposed under Rule 173 Q (1) to Rs 1,80,000/-
- setting aside the impugned order to the extent it relates to confiscation of land, building, plant & machinery, material or other belonging of M/s UCSSPL used in connection with the production, storage, removal or disposal of the goods,

5.2 Appeal filed by Appellant 2 is allowed.

5.3 Appeal filed by Appellant 3 is partially allowed to the extent of reducing penalty imposed on him under Rule 209A to Rs 50,000/-.

(Order pronounced in the open court on 30.09.2022)

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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