

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

**Excise Appeal No. 1168,1169,1175,1176,1177,1178,1179 & 1180 of
2011**

(Arising out of Order-in-Original No. 12/ANS/2010-11 dated 24.03.2011 passed by
Commissioner of Central Excise, Mumbai III)

M/s. Vijaylaxmi & Co. Gala No. 9, 3 rd floor, Panna House, Devidayal Compound, L. B. S. Marg, Bhandup (West), Mumbai-400 078.	Appellant
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Balarajeshwar & Co. Gala No. 10, 3 rd floor, Panna House, Devidayal Compound, L. B. S. Marg, Bhandup (West), Mumbai-400 078.	Appellant
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Ganesh Enterprises Audumbar Co-op. Housing Society, Plot No. 13, Room No. 4, Mhada Colony, Mulund (East), Mumbai – 400081.	Appellant
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Shreenath Enterprises 604, 'A' Wing, Bramha Niwas, Mhada Colony, Mulund (East), Mumbai – 400082.	Appellant
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B. N. Enterprises Trimurti Co-op Hsg. Society, Plot No.30, R.No. C/3, Mhada Colony, Mulund (East), Mumbai – 400 081.	Appellant
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Venkateshwara Enterprises 604, 'A' Wing, Bramha Niwas, Mhada Colony, Mulund (East), Mumbai – 400082.	Appellant
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Shree Engineering Works Plot No. 337E, Shenaz Villa No. 6, Hall Road, Kurla (West), Mumbai – 400 070.	Appellant
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Gee Kay & Co. Plot No. 17, R. No. 3, Subam Karot Society, Mhada, Mulund (East), Mumbai – 400 081.	Appellant
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Vs.

Commissioner of Central Excise, Mumbai - III 3 rd & 4 th Floor, Vardaan trade Centre, MIDC., Road No. 16, Wagle Estate, Thane (W) Mumbai- 400 604.	Respondent
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Appearance:

Shri J. C. Patel and Shri Anil Balani, Advocates, for the Appellants

Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised Representative,
for the Respondent

Coram:

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

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 23.02.2023

Date of Decision: 25.04.2023

FINAL ORDER NO. 85581-85588 / 2023

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original no 12/ANS/2010-11 dated 29.03.2011 of the Commissioner Central Excise Mumbai III. By the impugned order following has been held:

"ORDER

- (i) I confirm the demand for Central Excise duty amounting to Rs. 1,36,09,293/- (Rupees One Crore Thirty Six Lakhs Nine Thousand Two Hundred and Ninety Three only) [Rs. 1,33,37,233/- (Basic), Rs. 2,66,745/- (Ed. Cess) and Rs. 5,315/- (Higher Ed. Cess)] against M/s Vijaylakshmi & Co. under sub-section (2) of Section 11A of the Central Excise Act, 1944 and direct the noticee to pay the same forthwith;*
- (ii) I confirm the demand for Central Excise duty amounting to Rs. 19,92,386/- Rupees Nineteen lakhs Ninety Two Thousand Three Hundred and Eighty Six Only) [Rs. 19,53,320/- (basic) and Rs. 39,066/- (Ed. Cess)] against M/s Balarajeshwar & Co. under sub-section (2) of Section 11A of the Central Excise Act, 1944 and direct the noticee to pay the same forthwith;*
- (iii) I order recovery of interest from M/s Vijaylakshmi & Co. at the appropriate rates on the Central Excise duties confirmed at (1) above under the provisions Section 11AB of the Central Excise Act, 1944 and direct them to pay the same forthwith;*
- (iv) I order recovery of interest from M/s Balarajeshwar & Co. at the appropriate rates on the Central Excise duties confirmed at (2) above under the provisions of Section 11AB of the Central Excise Act, 1944 and direct them to pay the same forthwith;*
- (v) I impose penalty of Rs. 1,36,09,293/- (Rupees One Crore Thirty Six Lakhs Nine Thousand Two Hundred and Ninety Three only) on My Vijaylakshmi & Co. under the provisions of Section 11AC of the Central Excise Act, 1944 and direct them to pay the same forthwith;*
- (vi) I impose penalty of Rs. 19,92,386/- (Rupees Nineteen lakhs Ninety Two Thousand Three Hundred and Eighty Six Only) on M/s Balarajeshwar & Co. under the provisions of Section 11AC of the*

Central Excise Act, 1944 and direct them to pay the same forthwith;

(vii) In view of the findings recorded at para 42 above, I refrain from confiscating the goods or imposing a redemption fine.

(viii) I impose a personal penalty of Rs. 1,36,09,293/- (Rupees One Crore Thirty Six Lakhs Nine Thousand Two Hundred Ninety Three Only) on Shri Nandgopal, proprietor of M/s Vijaylakshmi & Co. under the provisions of Rule 26 of the Central Excise Act, 1944 and direct him to pay the same forthwith;

(ix) I impose a personal penalty of Rs. 19,92,386/- (Rupees Nineteen Lakhs Ninety Two Thousand Three Hundred Eighty Six Only) on Shri Prakash Pandya, proprietor of M/s Balarajeshwar & Co. under the provisions of Rule 26 of the Central Excise Act, 1944 and direct him to pay the same forthwith;

(x) In view of the findings recorded above, I hereby deny the exemption from payment of Central Excise duty claimed in the name of M/s B.N. Enterprises, M/s GEEKAY & Co., M/s Venkateshwara Enterprises, M/s Shreenath Enterprises, M/s Shree Engineering Works and M/s Ganesh Enterprises in terms of Notification no. 8/2003 dt 1.03.03 as amended;

(xi) I impose a personal penalty of Rs. 1,00,000/- (Rupees One Lakh Only) on Shri Bapu N. Dusane, proprietor of M/s B.N. Enterprises under the provisions of Rule 26 of the Central Excise Act, 1944 and direct him to pay the same forthwith;

(xii) I impose a personal penalty of Rs. 1,00,000/- (Rupees One Lakh Only) on Shri G. Konnayan, proprietor of M/s GEEKAY & Co. under the provisions of Rule 26 of the Central Excise Act, 1944 and direct him to pay the same forthwith;

(xiii) I impose a personal penalty of Rs. 1,00,000/- (Rupees One Lakh Only) on Shri G. Venkataraman, proprietor of M/s Venkateshwara Enterprises under the provisions of Rule 26 of the Central Excise Act, 1944 and direct him to pay the same forthwith;

(xiv) I impose a personal penalty of Rs. 1,00,000/- (Rupees One Lakh Only) on Smt. Tejas Venkataraman, proprietor of M/s Shreenath Enterprises under the provisions of Rule 26 of the Central Excise Act, 1944 and direct her to pay the same forthwith;

(xv) I impose a personal penalty of Rs. 1,00,000/- (Rupees One Lakh Only) on Shri P. Ganeshkumar, proprietor of M/s Shree

Engineering Works under the provisions of Rule 26 of the Central Excise Act, 1944 and direct him to pay the same forthwith;

(xvi) I impose a personal penalty of Rs. 1,00,000/- (Rupees One Lakh Only) on Shri P. Subburaj, proprietor of M/s Ganesh Enterprises under the provisions of Rule 26 of the Central Excise Act, 1944 and direct him to pay the same forthwith;"

2.1 Acting on intelligence that M/s Telebrands (India) Pvt Ltd were getting exercise equipments manufactured (marketed under the brand name "AB KING PRO") through certain manufacturer and that such manufacturing activity was actually controlled by two persons namely Shri G Nandgopal and Shri Prakash Pandya, but the production and clearances were shown in name of various manufacturers to avail the benefit of SSI exemption under notification No 8/2003-CE dated 01.03.2003, the premises of concerned manufacturers were searched by the officer of DGCEI under proper panchnama on 05.07.2007 and subsequently investigations undertaken against;-

- a. M/s Telebrand (India) Pvt Ltd)
- b. M/s Vijay Laxmi & Co (Proprietary Concern of Shri G Nandgopal)
- c. M/s Balarajeshwar & Co (Proprietary Concern of Shri Prakash Pandya)
- d. M/s Geekay & Co (Proprietary Concern of Shri G Konayan)
- e. M/s B N Enterprises (Proprietary Concern of Shri B N Dusane)
- f. M/s Dedhia Enterprises (Proprietary Concern of Shri)
- g. M/s Shree Engineering Works (Proprietary Concern of Shri P Sadanand Ganeshkumar)
- h. M/s Venkateshwara Enterprises (Proprietary Concern of G Venkatraman)
- i. M/s Shreenath Enterprises (Proprietary Concern of Ms Tejas Venkatraman w/o Shri G Venkatraman)
- j. M/s Ganesh Enterprises (Proprietary Concern of P Subburaj)
- k. Premises of Shri Kiran Khimasiya Chartered Accountant of entire group.
- l. Shri Ashwini Gupta (independent accountant maintaining accounts of these firms)

2.2 As result of investigations undertaken it was found that M/s Telebrands (India) Pvt. Ltd., which is a tele-marketing company, is an authorized distributor of the exercise equipment AB KING PRO, duly appointed by M/s HIPMG Inc., USA, for distribution of the product AB KING PRO in the region amongst other territories, India. They have

further, on the basis of samples provided, got moulds/dies manufactured through local mould/die makers, for the different parts and paid the charges due on such moulds dies. M/s Telebrands placed orders for manufacture of these equipments with M/s GNG & Co. owned by Shri Prakash Pandya and Shri G. Nandgopal. The exercise equipment marketed as AB KING PRO is classifiable under Chapter No.9506 91 90 of the CE Tariff Act, 1985, and is chargeable to duty at appropriate rates. The dies /moulds owned by M/s Telebrands were given to this firm for getting the various parts manufactured. Shri Prakash Pandya and G. Nandgopal got various components manufactured on job work basis and assembled it at M/s GNG & Co., packed them in plain cartons and delivered them to M/s Telebrands, without any brand name or trade name being affixed to the product upto July-04. On receipt of the manufactured gymnasium equipments, the employees of M/s Telebrands then checked the product for any defects and affixed with sticker of brand name AB KING PRO.

2.3 In the year 2004, Shri G. Nandgopal and Shri Prakash Pandya floated two separate proprietary concerns namely M/s Vijaylakshmi & Co. of Shri G. Nandgopal and M/s Balarajeshwar & Co. of Shri Prakash Pandya, which started individually manufacturing and supplying the exercise equipments to M/s Telebrands. The units claimed small scale exemption as envisaged under notification no. 8/2003-CE dated 01.03.2003. Shri G. Nandgopal and Shri Prakash Pandya, introduced persons known to them as manufacturers of gymnasium equipment, who then have "manufactured and supplied" gymnasium equipment to M/s Telebrands.

2.4 In order to take advantage of the SSI concession, Shri G. Nandgopal @ Gopi adopted a modus operandi by introducing several fictitious firms to distribute the actual turnover of his firm viz. M/s Vijayalakshmi & Co. among the said firms: M/s BN Enterprises, M/s GEE KAY & Co., and M/s Venkateshwara Enterprises, with the sole intention to avail benefits under the SSI scheme, by showing a turn over below Rs.1 crore.

8.3.3 The bank accounts of all the firms were opened at Mulund (W) branch of Bank of India by Shri Nandgopal and the orders were procured from M/s Telebrands in the names of these individual firms without the proprietors of the said firms coming directly in touch with the concerned persons of M/s Telebrands:

2.5 The finances required for starting the operations of these firms were also arranged for by Shri Nandgopal @ Gopi. The raw materials required was arranged as per the instructions of Shri Gopi and the job workers too were instructed by the said person to utilize the dies / moulds for making the required parts for assembly. The entire day to day transactions of these three firms were under the indirect control of Shri Gopi.

2.6 The firms viz., M/s GEE KAY & Co. (proprietor Shri G. Konnayan), M/s Venkateshwara Enterprises (proprietor Shri G. Venkataraman) and M/s Shreenath Enterprises (proprietor Smt. Tejas Venkataraman) were floated to facilitate diversion of clearances from M/s Vijayalakshmi & Co. and only paper transactions were created to show production and clearance of exercise equipment from the said firms.

2.7 All the above firms are under the financial and managerial control of Shri G. Nandgopal @ Gopi. and Shri G. Nandgopal has deliberately created a façade to show manufacture and supply from certain units which were only dummies where neither production nor clearance was taking place.

2.8 The turnover of M/s Vijayalakshmi & Co. (including the turnover of the firms M/s B.N. Enterprises, M/s GEE KAY & Co., M/s Venkateshwara Enterprises, M/s Shreenath Enterprises and M/s Shree Engineering Works have been shown from the said units) was as under:

(Value amount in Rs.)							
Year	Value of clearance						Total
	Vijaylaxmi	BN Enterprises	Geekay & Co	Venkateshwara Enterprises	Shreenath Engg.	Shree Engg	
2004-05	8743350	4879740	9976325	0	7377150	8844030	39820595
2005-06	8808578	9171743	9272614	6587763	0	9070302	42911000
2006-07	7668163						7668163
2007-08	2957946						2957946
Total	28178037	28178037	19248939	6587763	7377150	17914332	93357704

2.9 As the aggregate value of clearances of M/s Vijaylaxmi during the financial year 2004-05 exceeded Rs.300lakhs, therefore, they were not eligible for exemption provided under Notification No.8/2003 CE, as amended for the subsequent years.

2.10 Shri Prakash Pandya utilized one firm by name M/s Ganesh Enterprises of Shri P. Subburaj, as a dummy front unit, to facilitate clearances from his unit M/s Balarajeshwar & Co. The total turnover of M/s Balarajeshwar & Co. including the turnover shown in the name of M/s Ganesh Enterprises:

(Value in Rs.)			
Year	Value of clearances		
	Balarajeshwar	Ganesh Enterprises	Total
2003-04		5522790	5522790

2004-05	7694409	7320930	15015339
2005-06	8480000	8712909	17192909
2006-07	7763412		7763412
2007-08	2418839		2418839
Grand Total	26356660	21556629	47913289

2.11. It appeared that the said noticees actual turnovers in the above manner, in order to avail exemption as small had deliberately suppressed their scale units in terms of Notification 8/2003 CE, as amended, as a result of which the proviso to Section 11 A (1) of the CE Act, 1944, appears to be invokable, for extended period of limitation.

2.12 Thus M/s Vijayalakshmi & Co, and M/s Balarajeshwar & Co., through their above acts of omission and commission have deliberately, wilfully and with an intent to evade payment of CE duty contravened the provisions of section 6 of the CEA, 1944 (hereafter referred to as the said Act), read with Rules 4, 8, 9, 10, 11 & 12 of the CE Rules 2002 (hereafter referred as said Ruies), in as much as they have manufactured, stored and cleared excisable without payment of Central Excise duty as per rule 4 of the Central Excise rules, 2002

2.13 Others units who have availed of benefit of the notification 8/2003 CE, as amended, are merely dummy firms which have been created and used by the noticees at no.1 to 4 to divert the production and clearance of the above said units were either totally fictitious entities or the actual management control of the said units . In view of the above, the benefit availed under the Notification No.8/2003 CE, as amended is required to be denied to the noticees at serial no.5 to 10 to the notice. The person in whose name these dummy units were floated are also liable for penalty terms of Rule 26 of the CE Rules, 2002, for having dealt with the excisable goods which allegedly were liable to confiscation and resulted in the said evasion of CE duty;

2.14 Therefore, a show cause notice dated 03.07.2009 was issued to M/s Vijaylakshmi & Co. and M/s Balrajeshwar & Co. asking them to show cause as to why:

- Central excise duty amounting to Rs. 1,36,09,293/- (Rupees One crores, Thirty Six Lakhs Nine Thousands, Two Hundred and Ninety Three only) consisting of Rs. 1,33,37,233/- (Basic), Rs.2,66,745,- (Ed. Cess) and Rs.5,315/- (Higher Ed. Cess), should not be demanded and recovered from M/s Vijaylakshmi & Co. in terms of proviso to sub-section (1) of section 11 A of the CE Act, 1944;
- Central Excise duty amounting to Rs.19,92,386/- (Rupees Nineteen Lakhs Ninety two thousands, three hundred and Rs.

19,53,320/- (Basic), Rs.39,066/- (Ed. Cess), should not be demanded and recovered from M/s Balrajeshwar & Co. in terms of proviso to sub-section (1) of section 11 A of the CE Act, 1944;

- Interest at the appropriate rate should not be demanded and recovered from them in terms of section 11 AB of the CE Act, 1944;
- Penalty should not be levied on them in terms of section 11 AC of the CE Act, 1944;
- The goods cleared without payment of duty during the period from April- 2004 to June-2007, should not be confiscated in terms of Rule 25 of the CE Rules, 2002, and penalty imposed under the said Rule;

2.15 Shri G. Nandgopal, proprietor of M/s Vijaylakshmi & Cond Prakash K. Pandya, proprietor of M/s Balarajeshwar & Co were asked vide said show cause notice as to why penalty should not be imposed on them in terms of Rule 26 of the Central Excise Rules, 2002, for having dealt with the excisable goods which allegedly were liable to confiscation and resulted in the said evasion of Central Excise duty

2.16 M/s B.N. Enterprises Prop. Shri Bapu N. Dusane, M/s GEE KAY & Co.Prop. Shri G. Konnaya,M/s Venkateshwara Enterprises. Prop. Shri G. Venkataraman, M/s Shreenath Enterprises, Prop. Smt. Tejas Venkataraman M/s Shree Engineering Works Prop. Shri P. Ganeshkumar and M/s Ganesh Enterprises, Prop. Shri P. Subburaj were asked vide the said show cause notice as to why the exemption from payment of CE duty claimed by them in terms of Notification No.8/2003 CE as amended, for small scale units, for the aforesaid period should not be denied to them and penalty should not be imposed on them in terms of Rule 26 of the CE Rules, 2002, for having dealt with the excisable goods which allegedly were liable to confiscation and resulted in the said evasion of CE duty;

2.17 The show cause notice has been adjudicated as per the impugned order referred in para 1 above. Aggrieved appellant have filed this appeal.

3.1 We have heard Shri J C Patel Advocate for M/s Vijaylaxmi & Co and M/s Balarajeshwar & Co. and Shri Anil Balani Advocate for M/s Ganesh Enterprises, M/s Shreenath Enterprises M/s B N Enterprises, M/s Venkateshwara Enterprises, M/s Shree Engineering Works and M/s

Geekay & Co. We have also heard Shri Amrendra Kumar Jha deputy Commissioner, Authorized Representative for the revenue.

3.2 Arguing for his clients Shri J C Patel submitted that

- In absence of financial flowback between the appellants (his clients) on one hand and the said five firms on other hand, it cannot be said that any of the said five firms was a dummy of the Appellants. Reliance is placed on the following decisions
 - o Shree Packaging Corporation [1987 (32) ELT 94 (T)]
 - o Srinagar cosmetics [1988 (35) ELT 581 (T)] affirmed as {1996 (83) ELT A184 (SC)}
 - o Bentex Industries [2003 (151) ELT 695 (T)]
 - o Electro Mechanical Engineering Corpn [2008 (229) ELT 321 (SC)]
 - o Balsara Hygiene Products Ltd {2012 (278) ELT 526 (T)}
 - o Renu tendon [1993 (66) ELT 375 (Raj)]
 - o International dyestuff Mfg Co [1991 (53) ELT 85 (T)]
 - o Vivomed Labs P Ltd [1991 (53) ELT 152 (T)]
 - o Rang Udyog [1996 (83) ELT 648 (T)]
 - o Amit Talwar [2018 (362) ELT 324 (T)]
- Merely because the proprietors of 3 out of the aforesaid five firms were close relatives of appellants' proprietor and proprietor of fourth firm was earlier job worker for the appellants and proprietor of the fifth firm was working for the appellants, that would not make the said firms dummies of appellant.
 - o Pimpri gases [1990 (49) ELT 474 (T)]
- Providing of guidance by appellants' proprietor to the said five firms for sourcing/ procuring raw materials, introduction to bank for opening their bank accounts and helping them in getting credit facility, do not make the said other firms to be dummies of the appellants.
 - o Bhagwandas Kanodia & ors [1987 (32) ELT 204 (T)]
 - o Santha Industries [1995 (78) ELT 556 (T)]
- Having common Chartered Accountant for Tax Audit and filling of returns and common accountant for writing of accounts is no ground for clubbing of clearances.
- Thus M/s Geekay & Co of Shri K Govindswamy, M/s Venkateshwara Enterprises of Shri G venkataraman, M/s Shreenath Enterprises of Ms Tejas Venkataraman w/o Shri G Venkataraman, M/s Shree engineering Works of Shri P S

Ganeshkumar and M/s B N Enterprises of Shri Bapu Nathu Dusane were not the dummy of appellants. No conclusion to this effect could be drawn on the basis of the admission made by them in view of the decisions as follows:

- o Basudev Garg [2013 (294) ELT 353 9T)]
- o J & K Cigarettes {2009 (242) ELT 189 (Del)]
- o Andaman Timber Industries [2015 (324) ELT 641 (SC)]
- o Saron Mechanical works [2016 (332) ELT 80 (P&H)]
- Notice is barred by limitation.
 - o Cemphar Drugs & Liniments
 - o Pahwa Chemicals P Ltd. [2005 (189) ELT 257 (SC)]
 - o Steelcast Ltd. [2009 (14) STR 129)] affirmed at [2011 (210) STR 500]
 - o Religare Securities Ltd {2014 (36) STR 937]
 - o Lanxess Abs Ltd. [2011 (22) STR 587]
 - o K K Appachan [2007 (7) STR 230]
- Penalties liable to be set aside.

3.3 Arguing for his clients Shri Anil Balani submitted that-

- In the present case no proceedings were initiated against M/s Telebrands and its proprietor Shri Hitesh Israni who were actually the owners of the business of exercise equipment.
- All the processes in the manufacture of the exercise equipments were carried out on job work basis hence no premises of M/s Vijaylakshmi & Co or M/s Balrajeshwar & Co was ever needed.
- The independent identity of M/s. B.N. Enterprises & M/s. Ganesh Enterprises is established on the basis of the following documents
 - o Sales Tax Registration Certificates
 - o Income Tax and Sales Tax returns;
 - o Bank Statements;
 - o Telebrands Ledgers;
 - o Leave & Licence Agreement of Ganesh Enterprises;
 - o Sales Tax Assessment Order of B.N.Enterprises.
- In his statement dated 3.6.2008 Shri Nandgopal [reproduced in para 5.8.7 of the impugned Order] interalia stated as under:
 - o He did not agree with the contention of the department;
 - o Although the other manufacturers were related to him, they were carrying out all their manufacturing activities independently and he had no role to play in their day to day

activities, except for the initial introductions made to M/s. Telebrands and the suppliers and job workers;

- o Neither he nor his firm had any connection with the manufacturing activities which was carried on by them;
- o P. Ganeshkumar was one of the job workers and was introduced to Telebrands by him and Shri Prakash Pandya

- It is significant to note that there is no financial Flow-Back of funds between B. N. Enterprises and Vijayalakshmi & Co. No part of the finances of B.N. Enterprises came from Vijayalakshmi & Co and no part of the profits of B.N. Enterprises flowed to Vijayalakshmi. The income/ profits of B.N. Enterprises are assessed under Income Tax as that of B.N. Enterprises only. Reliance is placed on judgments of which compilation was submitted at the hearing, which consistently hold that in absence of financial flow-back, there can be no clubbing of clearances.
- Similarly there is no financial Flow-Back of funds between Ganesh Enterprises and Balarajeshwar & Co and therefore their clearances also Cannot be clubbed

3.4 Learned authorized representative reiterated the findings recorded in the impugned order.

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 in the impugned order recorded the following findings while adjudicating the show cause notice.

21. I find that the issue involved hereunder is the alleged floating of fictitious firms/units by M/s. Vijaylaxmi & Co and M/s. Balarajeshwar & Co, in order to distribute the actual turnover of their respective units with the sole intention to avail benefits under notification no.8/2003 CE dated 01.03.03 as amended by showing their turnover below Rupees One Crore to remain within the exemption limit and thus evade payment of Central Excise duty.

22. It is observed from the records that a search operation was conducted by the Officers of DGCEI at the premises of all the noticees and after investigations, it was revealed that M/s. Vijaylaxmi & Co. and M/s. Balarajeshwar & Co. are engaged in the manufacture of exercise equipment classifiable under chapter sub heading 95069190 of the Central Excise Tariff Act, 1985 and avail the benefit of Notification No.8/2003-CE dated 01.03.03 as amended: It was observed that M/s

Vijaylaxmi & Co. had floated several dummy units namely; M/s. B.N. Enterprises, M/s. GEEKAY & Co., M/s. Venkateshwara Enterprises, M/s. Shreenath Enterprises and M/s. Shree Engineering Works; whereas M/s Balarajeshwar & Co. had floated a dummy unit namely, M/s. Ganesh Enterprises in order to distribute their actual turnover and restrict it below Rupees One Crore to remain within the exemption limit specified under the Notification No. 8/2003 CE dt. 01.03.03 as amended.

23. Therefore, the impugned show cause notice proposes to demand and recover central excise duties payable from M/s Vijaylaxmi & Co. and M/s Balarajeshwar & Co. after clubbing their respective turnovers with the turnover of the fictitious firms/units mentioned supra, to recover the interest payable on these duties and to penalize all the noticees.

24. Before proceeding to the issue of interpretation and sustainability of the demand raised, it would be pertinent to review the Notification No. 8/ 2003-CE dt 01.03.03 as amended. The small scale exemption is subject to various conditions and provisions contained in the said notification. Depending upon the value of clearances of the preceding financial year, exemption is provided in the current financial year. There is a ceiling/upper limit beyond which no exemption is available. If ceiling is crossed, then the manufacturer becomes ineligible for small scale exemption.

25. On cumulative reading of the several depositions recorded by the department under Section 14 of the Central Excise Act, 1944, I find that due to increased demand for the exercise equipments, M/s Telebrands (India) Pvt. Ltd were interested in bringing in more number of manufacturers to supply the gymnasium equipments. Therefore, S/Shri Nandgopal and Prakash Pandya, proprietors of M/s Vijaylaxmi & Co. and M/s Balarajeshwar & Co. respectively, manufacturers and suppliers of these equipments to M/s Telebrands (India) Pvt. Ltd.; as per their own admissions, utilised this opportunity to introduce persons known to them as manufacturers of exercise equipments. Accordingly, they introduced S/Shri Bapu Dusane, G.Venkataraman, P.Ganeshkumar, Subburaj Perrummal and Smt. Tejas Konayyan Govindaswamy, Venkataraman as proprietors of M/s B.N. Enterprises, M/s GEEKAY & Co. M/s Venkateshwara Enterprises, M/s Shree Engineering Works, M/s Ganesh Enterprises and M/s Shreenath Enterprises respectively to Shri Hitesh Israni Managing Director of M/s Telebrands (India) Pvt. Ltd. This fact has also been corroborated by Shri Hitesh Israni in his statements to the department which were recorded under Section 14 of the Central Excise Act, 1944. Shri Hitesh Israni has also categorically stated that he

does not know any persons other than S/Shri Nandgopal and Prakash Pandya.

26. The proprietors of all the firms mentioned supra have admitted to the fact that the orders for supply of the exercise equipments were procured from M/s Telebrand (India) Pvt. Ltd. on their behalf by Shri Nandgopal and Shri Prakash Pandya. The bank accounts of their firms were opened in the Mulund (W) branch of the Bank of India at the behest of Shri Nandgopal and Shri Prakash Pandya, and the raw material required for the manufacture of these exercise equipments were also arranged by the aforesaid persons.

27. On careful reading of the depositions made by the suppliers of the raw material required for manufacture of the exercise equipments and the job workers who manufactured certain parts of the exercise equipments on job work basis, to the department which were recorded under Section 14 of the Central Excise Act, 1944; I deduce that the moulds and dies of the parts of the exercise equipments were prepared on the basis of the designs provided by S/ Shri Nandgopal and Prakash Pandya. The components which are essential parts of the exercise equipments cannot come into existence without the usage of these moulds and dies. As instructed by S/Shri Nandgopal and Prakash Pandya, these moulds and dies were used in the manufacture of the components of all the firms. S/Shri Nandgopal and Prakash Pandya stood as guarantors for supply of raw material to all these firms/units. Shri Sunil Alwani, partner of M/s Sunil Enterprises, a supplier of raw material, has stated that M/s Ganesh Enterprises was represented by Shri Prakash Pandya. One of the job workers, namely Shri Khandu Mahadev Shinde, proprietor of M/s Bharat Auto has also stated that Shri P. Sadanand Ganeshkumar (who is allegedly the proprietor of M/s Shree Engineering Works) collected all the 'Bent Pipes' for S/Shri Nandgopal and Prakash Pandya and at the end of the month the bills were prepared as per the names informed to him by Shri P. Sadanand Ganeshkumar. He has referred to the said person as a paid employee of S/Shri Nandgopal and Prakash Pandya.

28.1 I find the need to discuss the following depositions made to the department under Section 14 of the Central Excise Act, 1944, in further detail, as it holds extreme relevance to the subject case:

28.2 Shri Bapu Dusane, proprietor of M/s B.N. Enterprises has propounded in his statements made to the department under Section 14

of the Central Excise Act, 1944 that he is employed as a supervisor with M/s Vijaylakshmi & Co. There are no manufacturing activities conducted at the premises of M/s B.N Enterprises which coincidentally is the residential premises of Shri Bapu Dusane. As admitted by Shri Bapu Dusane and confirmed by Shri Nandgopal in their respective statements made to the department under section 14 of the Central Excise Act, 1944, the gymnasium equipments shown as manufactured and cleared to M/s Telebrands (India) Pvt. Ltd. from M/s B.N. Enterprises (under the cover of their delivery challans and invoices were actually manufactured in the premises of M/s Vijaylaxmi & Co. Shri Nandgopal in his statements made to the department under Section 14 of the Central Excise Act, 1944 has confessed to the fact that M/s B.N. Enterprises was floated as a dummy unit to suppress the actual production and clearance of M/s Vijaylaxmi & Co. and only documents were created to show that there was manufacture and supply of exercise equipments by M/s B.N. Enterprises to M/s Telebrands (India) Pvt. Ltd. Thus it is clearly evident that M/s BN Enterprises is a fictitious firm of M/s Vijaylaxmi & Co.

28.3 Shri P. Sadanand Ganeshkumar, proprietor of M/s Shree Engineering Works has admitted in his statements made to the department recorded under Section 14 of the Central Excise Act, 1944, that the transaction of the bank account of his firm which was opened at the Mulund (W) branch of the Bank of India was controlled by Shri Nandgopal. He has also confessed that he was just a front and the entire show was managed by S/Shri Nandgopal and Prakash Pandya. Further, Shri Khandu Mahadev Shinde Auto, a job worker, as mentioned in para 8 above, has identified Shri proprietor of M/s Bharat P. Sadanand Ganeshkumar as a paid employee of S/Shri Nandgopal and Prakash Pandya.

28.4 M/s GEEKAY & Co., M/s Venkateshwara Enterprises and M/s Shreenath Enterprises are owned by S/Shri Konayyan Govindaswamy (elder brother of Shri Nandgopal), G.Venkataraman (younger brother of Shri Nandgopal) and Smt. Tejas Venkataraman (sister in-law to Shri Nandgopal). All of them have accepted in their statements that Shri Nandgopal was instrumental in procuring business for them from M/s Telebrands (India) Pvt. Ltd. and that their business were run under the guidance of Shri Nandgopal.

28.5 Shri Subburaj Perumal, proprietor of M/s Ganesh Enterprises had submitted the copies of the lease agreement dated 04-02-04 between

Ripu Daman Gupta (HUF) and M/s Ganesh Enterprises for their premises. In order to verify the genuineness of his claim, I find that a Summons was issued to Shri Ripu Daman Gupta (HUF) to make available the copies of the agreement to which he replied that he does not have any connections with any of the firms for which details were called for. Thus the very existence of M/s Ganesh Enterprise is precluded.

Further, Shri Subburaj Perumal has admitted in his statements to the department which were recorded under Section 14 of the Central Excise Act, 1944 that the actual manufacturing of the exercise equipments was taking place in the premises of Shri Nandgopal.

28.6 During the course of the investigation, the residential premises of Shri Ashwini Gupta the Accountant handling the accounts of these firms was searched under panchnama dated 05.07.2007. A total of 74 documents in the form of files/books/diaries were withdrawn by the officers. Scrutiny of these documents revealed that there was extensive manipulation of the accounts. The purpose of these manipulations was to infuse life into the sham that these firms were in existence and conducting business activities of buying raw materials, getting it processed and supplying finished goods to M/s Telebrands (India) Pvt. Ltd. Due to the frequent manipulations, there were also numerous mix up's. It was found that there were several entries where expenditure originally shown in the accounts of one firm were thereafter diverted/shifted against other firms. It was also found from these records that there was an attempt to create the impression that the premises where BN Enterprises and GEE KAY & Co. were shown to be conducting their own manufacturing activities, had been taken by these firms on rent/ lease. Moreover, in his statement recorded on 24.07.2007, Shri Bapu N Dusane – proprietor of M/s BN Enterprises had stated that he is not manufacturing the goods and that the entire manufacturing activities were carried out at M/s Vijaylaxmi & Co. Shri Ashwini P. Gupta has deposed that he was maintaining the accounts of all the firms at the behest of Shri Prakash Pandya and that the documents related to the purchase and sales of all the firms was periodically handed over to him, for preparing their accounts by S/Shri Nandgopal and Prakash Pandya.

29. In view of the foregoing depositions, it is clearly evident that the transactions of all the firms/units mentioned supra were under the financial and managerial control of S/Shri Nandgopal and Prakash

Pandya. All activities related to these firms/units from the stage of procurement of raw material to the stage of marketing are absolutely common.

30.1 The above position is also corroborated from certain records seized from the possession of Shri Ashwini Gupta which are discussed as under:

30.2 Seized record no. 71 At page no.28 an entry stating " GEEKAY Bill no. 670 A -Cubes - 386955 Trf from Venkateshwara" was found. It is seen that M/s Chowdhary Tubes is a supplier of MS pipes to all the said firms /units. Undoubtedly, the mentioned entry clearly indicates that a bill which was issued to M/s Venkateshwara Enterprises was subsequently transferred to M/s GEEKAY & Co. At page no. 33, the entry " DHL to be trf to Shreenath /GNG" against Vijaylaxmi specifies that an expenditure of some kind shown in M/s Vijaylaxmi's financial records needed to be transferred and shown in the accounts of either M/s Shreenath Enterprises or M/s GNG & Co. Further, at page no.39, against Geekay the entry at serial no.6 shows 'Repayment of G. Venkataraman'. Shri G. Konnayan (elder brother to Shri Nandgopal) is the proprietor of M/s GEEKAY & Co. and G. Venkataraman (younger brother to Shri Nandgopal) is the proprietor of M/s Venkateshwara Enterprises. These entries indicate inter-financial relationship amongst the units. Another significant entry is at page no. 73 that states "Rent agreement for B.N. Enterprises." This clearly indicates fabrication of records since it has been admitted by Shri Bapu Dusane, proprietor of M/s B.N. Enterprises and confirmed by Shri Nandgopal, proprietor of M/s Vijaylaxmi & Co. that B.N. Enterprises was never in actual existence but is actually a fictitious firm M/s of M/s Vijaylaxmi & Co.

30.3 Seized Record No. 69: At page 3, there is an entry that states "BN Enterprises Purchase required for 12.5% 52539/-". As mentioned in the foregoing para, Shri Nandgopal has admitted to the fact that Enterprises is a dummy unit of M/s Vijaylaxmi & Co. Therefore such an entry in the books of account is a definite attempt to mislead the law into believing that M/s B.N. Enterprises is a firm in existence.

30.4 The distinct facts that emerge from the investigation are that M/s Telebrands (India) Pvt. Ltd. is the authorized distributor of an exercise equipment; viz. AB KING PRO. The product is classifiable under chapter heading 9506 91 90 of the CETA, 1985 and chargeable to duty. M/s Telebrands (India) Pvt. Ltd. have been appointed as distributors for this

product in India. M/s Telebrands (India) Pvt. Ltd. have been provided samples of the product. On the basis of these samples, they have got moulds/dies manufactured locally for the different parts. M/s Telebrands (India) Pvt. Ltd. then placed orders for these products with M/s GNG & Co. which is owned by Shri Prakash Pandya and Shri G. Nandgopal. The dies/moulds got manufactured by M/s Telebrands (India) Pvt. Ltd. were given by them to M/s GNG & Co. for manufacture of the parts of the product. Shri Prakash Pandya and Shri G. Nandgopal in turn, got various components manufactured on job work basis, assembled them at M/s GNG & Co. and packed them in cartons. These cartons were then delivered to M/s Telebrands (India) Pvt Ltd. The employees of M/s Telebrand (India) Pvt Ltd. Then check the products for defects and thereafter affix the sticker of the brand name – “AB King Pro”. In 2004, Shri G. Nandgopal and Shri Prakash Pandya started separate proprietary concerns; viz. M/s Vijaylaxmi & Co. & M/s Balrajeshwar & Co., respectively. These companies started manufacture and supply of the exercise equipments to M/s Telebrands (India) Pvt. Ltd. While doing so, they claimed the benefit of exemption under Notification No. 8/2003-CE dated 01.03.2003. At this point, purportedly at the instance of Shri Hitesh Israni - Telebrands (India) Pvt. Ltd. Shri G. Nandgopal and Shri Prakash Pandya Managing Director of M/s represented certain persons known to them as manufacturers of gymnasium equipment and passed of huge quantities of the product as "manufactured and supplied" by these persons to M/s Telebrands (India) Pvt. Ltd. The persons known to Shri G. Nandgopal were shown to be owners of units; viz. M/s B. N. Enterprises, M/s GEE KAY & Co., M/s Venkateshwara Enterprises, M/s Shreenath Enterprises & M/s Shreenath Engineering for the sole purpose of spreading the turnover of M/s Vijaylaxmi & Co. in such manner that the turnover of each of the units remains below Rs. 1 crore and they remain eligible for the benefit of SSI exemption under Notification No. 8/2003-CE dated 01.03.2003.

30.5 Significantly, the bank accounts of all these fictitious units were opened at the Mulund (W) branch of Bank of India at the instance of Shri G. Nandgopal. Moreover, Shri G. Nandgopal in person procured the orders from M/s Telebrands (India) Pvt. Ltd. in the names of these individual firms. He ensured that the proprietors of these units never came in touch with any person in M/s Telebrands (India) Pvt. Ltd. The finances required for creating these conjured up firms, the raw materials were arranged by Shri G. Nandgopal. Shri G. Nandgopal also

instructed the job workers to utilize the dies/moulds for making the required parts for the assembly of the product. As such, the entire operations and transactions of these firms was controlled by Shri G. Nandgopal @ Gopi. It is interesting to note that Shri Konnayan Govindaswamy Proprietor of M/s GEEKAY & Co. is the brother of Shri G. Nandgopal. Similarly, Smt. Tejas Venkatraman Proprietor of M/s Shreenath Enterprise's is the sister-in-law of Shri G. Nandgopal and Shri G. Venkatraman - Proprietor of M/s Venkateshwara Enterprises is the brother of Shri G. Nandgopal. It is also apparent from the seized records that these units were created to facilitate the artificial distribution of clearances from M/s Vijaylaxmi & Co. by faking paper transactions to show production and clearances of exercise equipment from these firms. Towards that end and purpose, Shri Nandgopal exercised financial and managerial control and created an elaborate sham in the form of these units where there was no activity whatsoever.

30.6 On careful scrutiny of the turnover of these fictitious units, it was found that the actual turnover of M/s-Vijaylaxmi & Co. for the financial year 2004-05 was Rs. 3,98,20,595/- and they were liable to pay central excise duty on clearances of value in excess of Rs. 100 lakhs; i.e. Rs. 2,98,20,595/-. They were thus liable to pay central excise duty including education cess amounting to Rs. 48,66,721/-. By virtue of the fact that the turnover of M/s Vijaylaxmi & Co. had exceeded Rs. 300 lakhs in 2004-05, they were not eligible to the benefit of the exemption under Notification No. 8/2003-CE dated 1.03.2003 in 2005-06, 2006-07 & 2007-08. It therefore follows that the entire turnover of Rs. 4,29,11,000/- for the financial year 2005-06 was chargeable to central excise duty from the first rupee. The central excise duty payable including education cesses is Rs. 70,03,075/-. So also, the turnover for 2006-07 being Rs. 76,68,163/-, central excise duty including education cesses amounting to Rs. 12,52,026/- was payable by M/s Vijaylaxmi & Co. Similarly the turnover for the financial year 2007-08 upto June 2007 is Rs. 29,57,946/- on which central excise duty payable including cesses works out to Rs. 4,87,470/-. Needless to say, these duties are perforce, recoverable from M/s Vijaylaxmi & Co.

30.7 The other main patron and beneficiary of this elaborate artifice – Shri Prakash Pandya has floated a firm by name M/s Ganesh Enterprises with Shri P. Subburaj as its proprietor to facilitate clearances from the unit of which he is the proprietor, viz. M/s Balrajeshwar & Co. and to

evade payment of duty on the goods manufactured by him there. It has been revealed by the investigation that only invoices/delivery challans were raised from M/s Ganesh Enterprises. The entire production and clearance of goods in respect of M/s Ganesh Enterprises were carried out at the behest of Shri Prakash Pandya. It was also discovered by the officers that the rented premises from where M/s Ganesh Enterprises were purportedly operating 'had never been rented out to Shri P. Subburaj Proprietor of the M/s Ganesh Enterprises. This fact has been confirmed with the owner of the premises. It was also stated by Shri Sunil Alwani who was one of the suppliers of rexine that M/s Ganesh Enterprises were always represented by Shri Prakash Pandya. In this view, it would be obvious that the turnover of M/s Ganesh Enterprises was essentially the turnover of M/s Balrajeshwar & Co. and hence includible thereunder for computing the exemption limits and duty liability on their turnover. On computing the turnover, it is observed that M/s Balrajeshwar & Co. had exceeded the threshold limit of Rs. 100 lakhs in 2004-05 by Rs. 50,15,339/- and were liable to pay central excise duty including cess amounting to Rs. 8,18,503/-. So also in 2005-06, they have exceeded the threshold limit by Rs. 71,92,909/- and hence are liable to pay central excise duty including cesses amounting to Rs. 11,73,883/-. These duties are, therefore, recoverable from M/s Balrajeshwar & Co.

31.1 The totality of the facts and circumstances discussed above clearly indicate that the whole show was controlled and masterminded by S/Shri Nandgopal and Prakash Pandya. The depositions recorded by the department under Section 14 of the Central Excise Act, 1944 are inscrutable evidences. I find that none of the statements have been retracted and therefore their evidentiary value remains undiminished and I therefore place reliance upon them. In this context I rely on the judicial pronouncement made by the Hon'ble Supreme Court in the case of Mineral and Metal Trading Corpn Vs R.C.Mishra [1993 (65) E.L.T 474 (S.C.)] wherein the Apex court has laid down that the disputed issues have to be decided on a totality of relevant factors applying the test of predominance.

31.2 In this regard, I seek to place reliance on the case law of Commissioner of Central Excise, Coimbatore vs. Acufil Machines[2004(177)ELT 326(Tri- Chennai)]. The relevant portion of the headnote is reproduced below. **Evidence - Admission - Statements, retraction of Clandestine removal It is not necessary for the**

department to struggle for any further evidence when, in the absence of valid retraction, admission made by the parties totally in favour of Revenue's case Section 14 of Central Excise Act, 1944.

31.3 So also in the case of *Devi Dass Garg vs. Commissioner of Central Excise, Delhi-1*[2010(257)ELT 289(Tri-Del)], the Tribunal has recorded its views regarding the standard of evidence required in central excise cases. The text of the headnote is reproduced below for reference.

Evidence. - Preponderance of probability confirmation of duty evaded and imposition of penalty - Standard of proof Confiscation of goods, required in departmental proceedings is preponderance of probability Adjudicating authority or Tribunal to evaluate evidence of both sides and decide what is most probable - Section 11A of Central Excise Act, 1944.[paras 5.5.3]

32. Thus all the evidences on record demonstrate that M/s. B.N. Enterprises, M/s. GEEKAY & Co., M/s. Venkateshwara Enterprises, M Enterprises, M/s. Shree Engineering Works and M/s. Ganesh Enterprises were Shreenath floated as dummy units by M/s Vijaylaxmi & Co. and M/s Barajeshwar & Co

In order to create a facade that there were several manufacturers involved who were independently eligible to avail exemption as small scale units in terms of Notfn No 8/2003-CE dt. 1.03.03 as amended.

33. Inspite of being given enough time and ample opportunity to make their submissions on the subject case, I find that submissions have been made only by M/s Vijaylaxmi & Co. and M/s Balarajeshwar & Co at the time of their. personal hearing. Whereas, although the authorized representatives of M/s B.N.Enterprises, M/s GEEKAY & Co., M/s Venkateshwara Enterprises, M/s Shreenath Enterprises, M/s Shree Engineering Works and M/s Ganesh Enterprises who attended the personal hearing promised to furnish their replies within fifteen days of their personal hearing, no submissions have been received till date.

34. I have carefully gone through the submissions of M/s Vijaylaxmi & Co. and M/s Balarajeshwar & Co. furnished in the matter and the citations enumerated by them in order to substantiate their claim that all the units are independent and are in existence. Since both the submissions are identical in almost every respect, I shall deal with them conjointly.

35. As regards the noticees' plea that separate preparation and filing of Balance Sheet, Income Tax returns and Sales tax returns for each of the said units indicate that all the units are existing independently, I find that the depositions by Shri Ashwini Gupta that the accounts related to all the units were regularly handed over by S/Shri Nandgopal and Prakash Pandya; and examination of the records seized from the possession of Shri Ashwini Gupta clearly indicate that the books of account of all the units were constantly being manipulated at the behest of the said persons. In the case of Lotus Chemical Industries and Aurobindo Chemical Industries, the Tribunal in their final order Nos. 458-459/91-C dated 21-5-1991 had observed that the mere fact that units are separately registered as small scale units or that they are separately assessed for Income-tax or Sales-Tax purposes, will not make any difference for clubbing the clearances of the firms. The ratio of this judgment is fairly applicable in the subject case. Therefore, I am of the view that separate filing of Balance Sheet, Income Tax returns and Sales tax returns do not establish the fact that all the units are independent entities. In fact the evidences mentioned supra throw light on the fact that the units namely, M/s B.N.Enterprises, M/s GEEKAY & Co., M/s Venkateshwara Enterprises, M/s Shreenath Enterprises, M/s Shree Engineering Works and M/s Ganesh Enterprises existed only on paper.

36. As far as the noticees' plea that all of them are separate proprietorship concerns engaged in the manufacture of exercise equipments and do not have inter-se financial relationship and common managerial control is concerned, I find that although all the units are separate proprietorship concerns on paper; all the activities related to these units from the stage of procurement of raw material to the stage of marketing are common. The bank accounts of all the units have been opened and are operated from the Mulund (W) branch of the Bank of India as directed by S/Shri Nandgopal and Prakash Pandya. The fact that all the units had credit facility from this bank at the behest of these persons and the fact that the said persons stood as guarantors for the raw material purchased by all these units establish that all these units were one and that these units were merely created as a camouflage to avail of the duty concession given to SSI units vide Notfn no. 8/2003 dt 1.03.03 as amended. In this context, I place reliance on the judicial pronouncement given in the case of Supreme Engg. Works, Super Flex Engg., Polymer and Super Plating and Engg. Corporation Vs C.C.E

wherein the Tribunal in their Final order Nos. 166- 168/93-C. dated 18-5-1993 [1996 (82)E.L.T. 102 (Tri)]. In that case, the Tribunal had held that when three units were acting in tandem clubbing of clearances' is justified. From the foregoing discussions, it is early evident that all the units were working together in order to suppress the actual turnover of M/s Vijaylaxmi & co and M/s Balarajeshwar & Co., to remain within the exemption limits as envisaged under Notfn No 8/2003-CE dt 1.03.03 as amended.

37. From the various decisions of the tribunal discussed above, it is evident that while an attempt has been made to create a charade to present the units to be distinct and separate, when the facts and circumstances are seen in totality, a new picture emerges where these units do not have independent existence but are a single manufacturing entity. Thus in the subject case, although all the named units masquerade to appear to be separate, the sum of the facts and circumstances establish that M/s B.N.Enterprises, M/s GEEKAY & Co., M/s Venkateshwara Enterprises, M/s Shreenath Enterprises, M/s Shree Engineering Works and M/s Ganesh Enterprises are dummy units.

38. In their submissions, the noticees have requested for permission to cross examine following persons:

- (a) Shri Hitesh Israni.*
- (b) Shri Ashwini Gupta.*
- (c) Shri Bapu Dusane. (request made by M/ Vijaylakshmi & Co. only)*
- (d) Shri Nandgopal. (request made by M/ Vijaylakshmi & Co. only)*
- (e) Shri Pramod Popat. (request made by M/ Vijaylakshmi & Co. only)*
- (f) Shri Subburaj Perumal (request made by M/s Balarajeshwar & Co. only)*
- (g) Shri Kiran Shelar (request made by M/s Balarajeshwar & Co. only)*

In this regard, I find that all the statements given by the said persons to the department were recorded under Section 14 of the Central Excise Act, 1944 which is deemed to be a "judicial proceeding" within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860 and hence I do not find the need to grant further cross examination of these persons. Therefore, their prayer for the same stands rejected.

39. In view of the foregoing findings and discussions, I hold that M/s B.N.Enterprises, M/s GEEKAY & Co., M/s Venkateshwara Enterprises, M/s Shreenath Enterprises, M/s Shree Engineering Works are fictitious firms floated by 'M/s Vijaylaxmi & Co. and M/s Ganesh Enterprises is a

fictitious firm floated by M/s Balarajeshwar & Co. in order to suppress their actual turnovers and remain within the exemption limit, as prescribed under notfn. no. 8/2003-CE dt 01.03.03 as amended. Therefore, all the charges made in the show cause notice sustain and have been proved beyond doubt. It is also established that all these acts of omission and commission were committed by the noticees knowingly with wilful intention to evade payment of proper central excise duty as elaborated in the foregoing paras which justifies invoking the extended period of limitation.

40. I also hold that the benefit availed under the Notification no. 8/2003-CE dt 1.03.03 as amended is denied to the noticees at Sr. no. 5 to 10 of the show cause notice namely, M/s B.N.Enterprises, M/s GEEKAY & Co., M/s Venkateshwara Enterprises, M/s Shreenath Enterprises, M/s Engineering Works and M/s Ganesh Enterprises and therefore the value of Shree their clearances shall be clubbed with the value of the clearances of M/s Vijaylakshmi & Co. and M/s Balarajeshwar & Co. i.e.

- (i) Value of clearances of M/s B.N.Enterprises, M/s GEEKAY & Co., M/s Venkateshwara Enterprises, M/s Shreenath Enterprises and M/s Shree Engineering Works to be clubbed with the value of clearance of M/s Vijaylakshmi & Co.*
- (ii) Value of clearance of M/s Ganesh Enterprises to be clubbed with M/s Balarajeshwar & Co.*

41. I further hold that central excise duty is recoverable under the provisions of subsection (1) of section 11A of the Central Excise Act, 1944 from M/s Vijaylakshmi & Co. and M/s Balarajeshwar & Co. after clubbing as mentioned above.

42 I am of the firm view that the goods cleared by the noticees in contravention to the various provisions of the Central Excise Act, 1944 and the Central Excise Rules, 2002 are clearly confiscable. However, confiscation implies appropriation to seizure. In the present case, since the possession of goods is not with the department, I neither confiscate the goods nor impose any redemption fine. In this context, I place reliance upon the following judicial pronouncements :

- (i) The Tribunal in the case of Ram Khazana Electronics Vs Air cargo Jaipur [2003(156) ELT-122(TRI) held that – where no enforceable security is available with the department and the goods are not available for confiscation, redemption fine cannot be imposed.*

(ii) *The Tribunal in the case of CC, Kandla Vs Sahil Traders [2004 (177) ELT 732 (Tri-Del)] and G.M.Exports Vs C.C, Bangalore (2008(226)ELT 571 (Tri-Bang) held that redemption fine cannot be imposed in respect of goods which were not seized and unless the goods are seized there cannot be any confiscation thereof.*

(iii) *The Larger Bench in the case of Shiv Kripa Ispat Pvt. Ltd Vs CCE, Nasik (2009 (235) ELT623(Tri-LB)] observed that "Precedents - Appeal against Tribunal order dismissed and such decisions affirmed by Binding precedent- Supreme Court - Similar view taken by High is binding precedent-SLP against contra decision of another High Court dismissed by Supreme Court and such High Court decision ceases to be good law and not having precedent value. (Para 10)*

With regard to the available provisions for confiscation in Central Excise Law, the tribunal at Para 11 held that "It is nobody's case that a binding judicial authority on the question of imposability of fine under Section 125 of the Customs Act in lieu of confiscation would not be applicable where the similar question arises as to whether a fine could be imposed under Rule 25 of the central Excise Rules, 2002 (read with Section 34 of the Central Excise Act) in lieu of confiscation of excisable goods not available for confiscation"

43. *With regard to the proposal for imposition of penalty, it is pertinent to mention that the Hon'ble Supreme Court in the case of Gujarat Travancore Agency Vs Commissioner Income Tax [1999 (42)ELT350(SC)] had opined that tax liability is a civil obligation. Drawing from this pronouncement of the Supreme Court, one has to interpret the expression intent to evade duty' in the case of civil obligation (like tax obligation). One can only seek to establish this through tax behaviour. Tax behaviour in central excise is self-assessment by the manufacturers.*

44. *I find that Shri Bapu N. Dusane Proprietor of M/s B. N. Enterprises, Shri G. Konnaya Proprietor of M/s GEE KAY & Co., Shri G. Venkataraman Proprietor of M/s Venkateshwara Enterprises, Smt. Tejas Venkatraman Proprietor of M/s Shreenath Enterprises, Shri P. Ganeshkumar - Proprietor of M/s Shree Engineering Works and Shri P. Subburaj Ganesh Enterprises have knowingly let their name be associated with the Proprietor of M/s manufacture of the product supplied to M/s Telebrands (India) Pvt. Ltd. These persons have been instrumental in the act of evasion of central excise duty by wrongly*

availing the benefit of small scale exemption under Notification No. 08/2003-CE dated 01.03.2003. By lending their names and premises to be shown as addresses for manufacturing units which had no existence, the abovenamed persons have abetted Shri Nandgopal and Shri Prakash Pandya in their scheme of setting up these dummy units. It has been established by the investigation that the records of M/s B. N. Enterprises, M/s GEE KAY & Co., M/s Venkateshwara Enterprises, M/s Shreenath Enterprises, M/s Shree Engineering Works and M/s Ganesh Enterprises were being falsified with the sole intent of passing them off as working units. By their acts of aiding Shri Nandgopal and Shri Prakash Pandya in perpetuating this fraud and passing of the products as having been manufactured by them, they have concerned themselves with these goods. These goods were subsequently being cleared to M/s Telebrands (India) Pvt. Ltd. without payment of duty by wrongly availing the benefit of exemption under Notification No. 8/2003-CE dated 01.03.2003 and hence were liable for confiscation. As such these persons have by their acts of omission and commission rendered themselves liable to be penalized under the provisions of Rule 26 of the Central Excise Rules, 2002. The fact that the goods have not been confiscated will not have any bearing on the imposability of penalty. In this regard, I place reliance upon the case law of Nandesari Rasayane Ltd. vs. Commissioner of Central Excise & Customs, Vadodara[2009(244) ELT 289(Tri-Ahmd.)].

Penalty - Personal penalty Export goods diverted by merchant-exporter in local market - Submission that in absence of finding that goods liable to confiscation, personal penalty not imposable - HELD It is the knowledge of person about liability of confiscation and not decision of Commissioner about liability to confiscation that decides penalty - Person dealing with goods either should know or have reasons to believe that same liable to confiscation case that Shri V.L. Chalke not aware that goods liable to confiscation - Penalty imposable - Penalty also liable under Rule 14A of erstwhile Central Excise Rules, 1944 for diversion of goods - Rule 26 of Central Excise Rules, 2002.

I am, therefore, of the firm view that these persons are liable to be penalized.

45. I find that the tax behaviour of the noticees clearly reflect the fact that they were well aware that floating of fictitious firms would facilitate them in availing the exemptions and concessions as envisaged under Notification No. 8/2003-CE dt 01.03.03. They deliberately suppressed

their turnover in such manner and thus evaded payment of central excise duty which was legally due. Their intent is thus crystal clear. Therefore, they have rendered themselves liable to be stringently penalized.”

4.3 The issue involved in the present case has been referred to the issue of the clubbing of the clearance of various entities which were found to be dummy during the investigation with the clearances of the two appellants namely M/s Vijaylaxmi & Co and M/s Balrajeshwar & Co for determining the eligibility to the exemption contained in the Notification no 8/2003-CE dated 01.03.2003. The appellants are contesting the issue solely on the ground that there was no financial flowback and hence the clubbing cannot be done as have been held in various decisions referred to by them.

4.4 The factual matrix that is undisputed in the present case is reproduced in table below:

Name of Unit	Proprietor	Relationship with G Nandgopal
VijayLaxmi & Co	G Nandgopal	Self
Geekay & Co	K Govindswamy	Brother
Venkateshwara Enterprises	G Venkatraman	Brother
Shreenath Enterprises	Tejas Venkatraman	Sister in Law W/o G Venkatraman
Shree Engineering Works	P S Ganeshkumar	Job worker
B N Enterprises	B N Dusane	Consultant engineer/ Supervisor working on salary Rs 2500/- per month increased to Rs. 8000/- per month at the time of investigation.

Name of Unit	Proprietor	Relationship with Prakash Pandya
Balrajeshwar & Co	Prakash Pandya	Self
Ganesh Enterprises	P Subburaj	Employee of Prakash Pandya

Commissioner has in the impugned order recorded specific finding in respect of the each of the entity concerned and how the same has been floated by Shri G Nandgopal, from time to time to remain within the exemption limits as per the Notification no 8/2003-CE dated 01.03.2003.

4.4 Interestingly all the unit concerned are the proprietary ship concern of the person closely knitted with Shri G Nandgopal. Ms Tejas Venkatraman in her statement recorded under Section 14 specifically stated as follows:

- o *The firm M/s Shreenath Enterprises was floated as per the instructions of her husband Shri G Venkatraman.*
- o *She never enquired why the firm was needed to be floated nor was she aware of the business to be conducted from the firm.*
- o *Only subsequently her husband informed her that firm was engaged in the manufacture of gymnasium equipments. She is not aware as to what type of equipments are manufactured, and as to who are there customers or the suppliers from whom they purchased the raw material etc.*
- o *She has not given any power of attorney to her husband to look into day to day affairs of her firm. She was only signing the documents when so ever asked by her husband.*
- o *As informed by her husband after one or two years of undertaking the business of the manufacture of gymnasium equipments, firm stopped the same and started the business of import/ export which is looked after by Shri Nandgopal @ Gopi.*

4.5 Shri Bapunath Dusane has in his statement stated as follows:

- *my education qualification is Xth passed from Poona Board and I passed in the year 1978. My college is at Bhalod, Talika Yaval, District Jalgaon. After passing my Xth Examination and after a period of two to two and half years, I came to Mumbai and joined I.T.I. Abhinav Technical Institute, Dadar, for the course of Turner and Fitter. In the year 1982 I joined M/s. Metropolitan Springs Pvt. Ltd., Wadala, Mumbai as machine (Leth) operator and worked with them for nearly 11 months. Subsequently I, joined M/s. Emco Electricals, Sion, M/s. Kumar Specialty Products, Bhandup as supervisor till January, 2002. Since, M/s. Kumar Specialty Products, Bhandup was shut down, I was in search of a new job. Meanwhile, I came in contact with Mr. G. Nandgopal alias Gopi who was proprietor of M/s. Vijay Laxmi & Company, Panna House, Bhandup West, Mumbai and after inquiry with him for a job, he offered me to join M/s. Vijay Laxmi & Company, as supervisor, on a starting monthly salary of approximately Rs.2,500/- per month.*

- *As a supervisor, I was carrying out the work of quality control of the products viz. gymnasium equipments, manufactured by M/s. Vijay Laxmi & Company. I was also assisting in solving the technical problems arising during the manufacture of the equipments. On being asked I state that at present my monthly salary is around Rs.8,000/- per month.*
- *I have been shown the panchanama dated 05.07.2007 drawn at my said residential premises where I am staying, wherein it has been mentioned that during the course of search there were no manufacturing activities, or sale or marketing of any goods carried out from my residential premises. I have signed the said panchanama in token of having seen the same. On being asked I state that I agree with the fact recorded in the said panchanama dated 05.07.07.*
- *Now I have been shown the files bearing serial number 21 and 22, produced by Shri. Kiran Hirji Khirashiya, Chartered Accountant in his statement dated 05.07.2007. I put my dated signature on the first and the last page of the said files in token of having seen and perused by me. I confirm that these two files contains the delivery challans and the sale invoices, for the period from 30.04.2003 to 19.03.05 (file no. 21) and from 02.06.2005 to 01.02.2006 (file 30.22) issued by M/s. B. N. Enterprises, Trimurti Hsg. Society, Plot No.30, East, Mumbai - 400 081 for supply Room No.C/3, MHADA Colony, Mulund East – Mumbai 400081 for supply of gymnasium equipments, only to M/s. Telebrands (I) Pvt. Ltd., Devidayal Compound, Bhandup. I confirm that the same are prepared in my own handwriting in a capacity as proprietor of M/s. B. N. Enterprises. On being asked I state that these delivery challans and the invoices were prepared by me as per the instructions/directions given by Shri. G. Nandgopal alias Gopi.*
- *I have never manufactured or delivered the gymnasium equipments mentioned in the said invoices or challans from said premises shown as of M/s. B. N. Enterprises to M/s. Telebrands (I) Pvt. Ltd. I agree that the said gymnasium equipments were manufactured at the premises of M/s. Vijay Laxmi & Company, at 3rd Floor, Panna House, Bhandup and were supplied to M/s. Telebrands (I) Pvt. Ltd., under cover of delivery challans and the invoices of M/s. B. N. Enterprises.*

- *I had only prepared the papers viz. delivery challans and the invoices as per the instructions of Shri. G. Nandgopal alias Gopi.*
- *I further confirm that the said delivery challans and the invoices of M/s. B. N. Enterprises were prepared to create an impression that the gymnasium equipments were manufactured by Ms. B. N. Enterprises and supplied to M/s. Telebrands (I) Pvt. Ltd.*
- *I state that I am not aware the reasons for the said documentation.*
- *I state that I was getting my salary without any additional monthly consideration for the said documentation. However I have received additional Rs.15.000/- from Shri Gopi during the Diwali festival. On being specifically asked I state that the above documentation, establishment and transactions shown to be carried out were as per the instructions and directions of Shri. G. Nandlal alias Gopi.*
- *Regarding the payments made by M/s. B. N. Enterprises, for its purchases made during the said period I say that being a proprietor of M/s. B. N. Enterprises, I was the authorized signatory for issue of cheques for making payment to the suppliers.*
- *I state that all the raw material shown to be received by M/s. B. N. Enterprises was at the premises of M/s. Vijay Laxmi & Company, 3rd Floor panna House, Bhandup and not at my residence On being asked I state that as the goods, which were, manufactured in the manufacturing unit of M/s. Vijay Laxmi & Company, 3rd Floor, Panna House, Bhandup were shown to be manufactured in the name of M/s B. N. Enterprises there was no question of my investment in the said factory.*
- *My current account is with Bank of India, Mulund (W) which was closed since April, 2006 or May, 2006 and with New Bharat Co-op. Bank (Bhandup) were opened by Shri Gopi. All the accounts of my company were maintained by Shri Ashwin. Gupta and Kiran Khimshiya, C.A. along with all other companies run by Shri Gopi.*
- *I was not aware of the income or expenditure or receipt or out going from my said accounts as the same were looked after by Shri Gopi.*
- *I have also not received or I am also not aware whether there was any profit or loss to my company. On being asked I state that once or twice as instructed by Shri Gopi I have signed the balance*

sheets of the company along with the sales tax returns. I am not aware who has filed the said returns with the said departments.

- *I am not confirm but initially Shri Hitesh Israni the owner of M/s Telebrands (1) P. Ltd must be financing M/s. Vijay Laxmi & Company or Shri Gopi. On being asked I state that in M/s Vijay Laxmi & Co. use to manufacture gymnasium equipments only for M/s Telebrands (I) Pvt. Ltd., and not anybody else.*
- *I was working with M/s Vijay Laxmi & Co. for more than five years. I am aware of the suppliers of raw materials but I was not aware of how much and which raw material was being shown in the name of M/s. B. N. Enterprises.*
- *I allowed using myself, my name, my residential address to Shri Gopi to create the documents in the name & style as M/s B. N. Enterprise though the goods actually manufactured by and at M/s. Vijay Laxmi & Company, 3rd Floor, Panna House, Bhandup where I was working as supervisor for monetary consideration”.*

4.6 Shri Nandagopal Govindswamy @ Gopi has in his statement recorded under Section 14 of the Central excise Act, 1944 stated as follows:

“On being asked 1 further state that I am also running a Proprietorship company namely M/S Vijay Lakshmi & Co., 9, Panna House, Devidayal Compound, LBS Marg, Bhandup West, Mumbai-400078. This company started in October 2004 after getting the assurance from Mr. Hitesh Ishrani for purchase of Gym. Equipments manufactured by the said company. I have acquired the premises approximately 860 sq. feet, from Mr. Devi Kumar, the proprietor of Devi Dayal Compound on rental basis. I entered into an agreement with deposit of Rs. 50000/- and monthly rent of Rs. 12000/- per month. The copy of agreement with rental receipts will be made available with in a period of 10 days. I further state that M/s Vijay Lakshmi & Co. is engaged in the manufacture of Gym. Equipments. The Gym. Equipments are manufactured and sold to M/s Teicbrands (1) Pvt Ltd. only. There is no written agreement for sale and purchase of the product between M/s Telebrands (1) pvt. Ltd and M/s Vijay Lakshmi & co. The details process of manufacture has already been explained in this statement in case of M/s GNG & Co. On being ask about the machinery installed in the premises for manufacture of Gym. Equipments, I state that, the company has five Drilling machines, and that no other machinery is installed in the same premises. The value of the drilling machine is

around Rs.20000/- The company was having around 10 to 12 workers, the strength of the workers has been reduced to 6 to 8 from December 06. I state that the daily salary of the worker is ranging from Rs. 70 to Rs. 100 per day. There is no permanent worker on the muster role. I state that one Mr. Pramod Sedge (fitter) and Mr. Bapu Dusane Engg. Consultant are working with the company for the last 5 years. The monthly salary of Mr. Pramod Sedge is Rs.3500/- and Mr. Bapu Dusane as consulting charges is Rs. 5000 to Rs.6000/- M/s Vijay Lakshmi & co. has manufactured around 6500 pieces of Gym. Equipment per year. During the period from October, 2004 to June, 2007 the company has manufactured around 16000 pieces of Gym Equipments and supplied to M/s Telebrands (1) Pvt. Ltd. Bhandup. The value of per piece is Rs. 1237/- ...”

“Today you have shown me a statement of Mr. Bapu N. Dusane dt. 24/7/07 recorded under section 14 of the Central Excise Act 1944. I have carefully gone through the said statement dt. 24/7/07 and put my dated signature on it token of having read and perused the same. In this regard. I state that Mr. Babu Dusane has been working as Consultant Engg.with M/s Vijay Lakshmi & co. Bhandup-west on the monthly basis for the last 5 years. I agree with contents of the statement of Mr. Bapu Dusane that M/s B.N. Enterprises was floated as a manufacturing unit for manufacture of Gym. Equipment for M's Telebrands (I) Pvt. Ltd. from the residence premises of Mr. Bapu Dusane that is flat no. 30.. Trimurthi Co-op Hsg. Scy. R.no. C/3. MHADA colony, Mulund-east. Mumbai- 400081 in the name of Mr. Bapu Dusane as proprietor. I confirm that the Gym. Equipments shown as manufactured and cleared to M/s Telebrands (1) pvt. Ltd. under the cover of Delivery challans and invoices were actually manufactured from the premises of M's Vijay Lakshmi & co. situated at 9. Panna House, Devidayal Compound LBS Marg, Bhandup-west, Mumbai-78. and delivered to M/s Telebrands (I) Pvt. Ltd. Bhandup. On being asked the reason for showing the manufacture in the name of M/s B.N. Enterprises from the residence premises of Mr. Bapu Dusane, instead from M/s Vijay Lakshmi & co... I state that, in order to remain below Rs.1 crore turnover available to SSI unit and to remain under the exemption as provided under Central Excise Act and Rules the new company in the name of M/s BN Enterprises was floated. I further state and confirmed that M/S B.N Enterprises was floated by me. I have put my dated signature on the statement of Mr. Bapu Dusane dated

24/7/07 in token of having confirming and accepting the contention therein.”

“I have now been shown the statement of Shri Hitesh Israni, Managing Director of M/s Telebrands India Pvt. Ltd. dated 18.10.07. I have carefully read this statement and I have put my dated signature on this statement today in token of having read it. I have now been asked to comment on the statement of Shri Hitesh Israni, where he has stated that initially he was in touch with Shri Prakash Pandya and Shri Nandgopal Gopi of M/s GNG & Co. for manufacture of the gymnasium equipment AB KING PRO. To-this, I say that as explained by me earlier, myself and Shri Prakash Pandya were the two partners of one firm running in the name and style M/s GNG & Co. This firm was initially manufacturing equipment for M/s Telebrands which was sold by them under the name "Surya Namaskar". Subsequently, Shri Hitesh Israni wanted to launch another type of gymnasium equipment, which was sold by them under the name AB KING PRO. We were asked if we possessed the capability to manufacture this product and were also given prototype of the same. In the year 2003, we have agreed- to manufacture this gymnasium equipment, which was as per the sample given to us. However, in this year, there was a difference of opinion between Shri Prakash Pandya and myself, due to which we decided to part ways for the purposes of manufacture of the gymnasium equipment. However, the firm M/s GNG & Co. continues to exist and it is subsequently engaged only in imports and trading. As per our mutual understanding, Shri Prakash Pandya started a firm by name M/s Balarajeshwar & Co. and I floated a firm by name M/s Vijaylaxmi & Co. These two firms independently started to manufacture the gymnasium equipment which was supplied to M/s Telebrands. I also wish to clarify that the process involved in the manufacture of this gymnasium equipment is only in the nature of assembly and checking of the various parts, for defects if any. I say that there are standard designs as per which the raw material i.e. the M S Pipes were bent and welded by the job worker. Even the seat to be attached and the rexine covering, powder coating of the equipment was standard as per the sample. The assembly process only required big Staplers and drilling machines. Due to the simple nature of the assembly, there is no need to have any qualified worker to do the job of assembly, though, I admit that the job work of bending of pipe, welding and powder coating may require some technical knowledge. I say that there is no contradiction in the

statement of Shri Hitesh Israni that he was in touch with Shri Prakash Pandya and Shri Nandgopal. I further say during the period 2004-05 and 2005-06, there was a tremendous pressure to supply quantity of the exercise equipment to M/s Telebrands. I say that Shri Hitesh Israni was also not comfortable with the fact that the entire production activity was controlled by only two persons, and he encouraged us to find further vendors, who may be in a position to manufacture and supply the gymnasium equipment for M/s Telebrands. Accordingly, we were forced to look out for new vendors for the same. I state that since the orders received from Telebrands was lucrative, and there was a reasonable margin available after taking care of all expenses involved in the manufacturing process, I introduced my family members, Shri G. Konnayan and Shri G. Venkataraman into this business. I say that apart from my brothers, I have also introduced Shri P. Ganeshkumar, who was earlier doing job work of fabrication for the gymnasium equipment. I say that G Konnayan was supplying equipment through the firm M/s Gee Kay & Co., M/s Shreenath Enterprises was the firm of the wife of Shri G. Venkataraman, which manufactured gymnasium equipment initially and then started imports. In the year 2006 Shri G. Venkataraman started the firm M/s Venkateshwara Enterprises, which was engaged in the manufacture of the gymnasium equipment for supply to M/s Telebrands. I say that Shri P. Ganeshkumar accepted the offer of becoming a manufacturer of gymnasium equipment, and he started a firm by name M/s Shree Engineering Works. I say that further, through us, Shri Naresh Dedhia, who is another job worker, doing work of powder coating, was also introduced to M/s Telebrands and he initially supplied gymnasium equipment through one existing firm M/s Ravi Coats, which was subsequently closed and another firm by name M/s Dedhia Enterprises. To this I would further like to add that Shri Hitesh Israni, during that period, was also on the lookout for more suppliers apart from the ones introduced by us, and insisted that we should try and identify foreign suppliers for the gymnasium equipment. Accordingly, myself and Shri Prakash Pandya made efforts to identify similar equipment manufacturers at China, since the Chinese manufacturers offer very competitive rates. After identifying such manufacturers and after getting satisfied about the quality of their product, we started supplying imported gymnasium equipment to M/s Telebrands through M/s GNG & Co., and then also from M/s Shreenath Enterprises. I have now been asked to comment on the statement of

Shri Ashwini P. Gupta, dated 10.01.08, wherein he has stated that he has not visited the factory/ office premises of M/s BN Enterprises, M/s GEE KAY & Co, M/s Shree Engineering Works, M/s Shreenath Enterprises and M/s Ravi Coats. To this, I say that Shri Ashwini Gupta was introduced to myself and Shri Prakash Pandya by Shri Kiran Khimasiya, a Chartered Accountant, who was regularly filing the returns of M/s GNG & Co, as we had requested that there is no competent person to look after the day to day accounting of our firm, which led to accounting problems. Shri Ashwini Gupta is a free-lance accountant who showed his willingness to handle the regular accounts of our firms. I say that he has started looking after the accounts work on our behalf only after July, 2005. I say that M/s Ravi Coats of Shri Naresh Dedhia was operating prior to this period and was not into any manufacturing activity after Shri Ashwini started handling our accounts, and hence he may not be aware of the manufacturing premises of M/s Ravi Coats. As regards M/s Shreenath Enterprises, I say that at the time when Shri Ashwini started handling our accounts, M/s Shreenath Enterprises had stopped manufacturing activity and was engaged in import and supply of the gymnasium equipment to M/s Telebrands, and hence it is possible that Shri Ashwini was not aware of the manufacturing premises of M/s Shreenath Enterprises. I say that during the relevant period, I was handling the import business of M/s Shreenath Enterprises, and I requested Shri Ashwini to handle the accounts of this firm also. M/s Gee Kay & Co. is a firm of my brother Shri G. Konnayan and he had his manufacturing facility at Saki Naka. I am not aware whether Shri Ashwini has at any time visited this factory premises at Saki Naka, but it is possible that since he was only handling the accounting on the basis of documents, he may have felt that it is not necessary for him to visit the premises of M/s Gee Kay & Co. I have now been specifically asked about M/s Ganesh Enterprises, and the submissions made by Shri Ashwini Gupta on the basis of the evidences put in front of him. I have now been shown the statement dated 16.10.07 of Shri Sunil Alwani of M/s Sunil Enterprises, a supplier of rexine. I have carefully read this statement and put my dated signature on the same in token of having read it. After carefully reading these statements, I say that the documents shown to me indicate that Shri Subburaj Perumal of M/s Ganesh Enterprises was actually a front used. I say that Shri Prakash Pandya will be in a better position to explain the

nature of understanding between him and Shri Subburaj as this person was introduced on behalf of Shri Prakash Pandya."

"Q. Shri Ganesh Kumar has stated that you and Shri Prakash Pandya had helped him in opening a bank account at Mulund (West) Bank of India. He has further stated that he was never in control of the transactions in the said account. He has further stated that whenever the raw material suppliers raised bills for the material supplied to M/s Shree Engineering Works, he intimated Shri Gopi and Shri Prakash Pandya who made arrangement for payment on behalf of M/s Shree Engineering Works. He has also stated that he had received express instructions from you and Shri Prakash Pandya not to manufacture or supply AB KING PRO to any other party other than M/s Telebrands India Pvt. Ltd. He has also stated that he is just the front and the entire show is managed by Shri Gopi and Shri Prakash Pandya. You may please comment on the above.

A. I have carefully read the question written above. I agree to the fact that we, namely myself and Shri Prakash Pandya had offered to Shri Ganesh Kumar an opportunity to manufacture and supply gymnasium equipment to M/s Telebrands, and in this connection, apart from introducing M/s Shree Engineering Works to M/s Telebrands and all the raw material suppliers, we had also assisted him in opening a bank account. Here I will like to clarify that we had asked Shri Ganesh Kumar to start a new firm because he was earlier a job worker and was not maintaining any books of accounts properly, and M/s Telebrands being a reputed company, they were keen to get supplies from firms who were registered with the Sales Tax authorities, and to avoid any complications with the sales tax authorities, we had suggested that he start manufacturing activity in a new firm. Further, since all payments from M/s Telebrands are through cheque, we had also assisted in introducing the firm of Shri Ganesh Kumar for opening of a Bank Account. I also clarify that M/s Telebrands has an account with Bank of India, Mulund Branch, and hence we preferred all the accounts of the manufacturers to be in this branch for easy clearance of payments. I say that we had stood guarantee on behalf of M/s Shree Engineering Works to the raw material suppliers, and on our word, suppliers had given goods on credit to M/s Shree Engineering Works in the initial stage. At that time, we may have insisted Shri Ganesh Kumar to keep us informed about payments made to the suppliers because in case of default by him, either me or Shri I state Prakash were responsible for

the payment due to guarantee given by us. specifically that I was never in control of the bank account of M/s Shree Engineering Works and I was also never involved in the day to day activity of M/s Shree Engineering Works apart from the facts stated by me above."

4.7 Shri Prakash Pandya has in his statement recorded under Section 14 of the Central Excise Act, 1944 stated as follows:

"I have now been shown the statement dated 19.03.08 of Shri Nandgopal G. @ Gopi, given before your officers, and I have carefully read the same. I have now been asked to explain the nature of relation between me and Shri Gopi. To this I say that as explained by Shri Gopi in his statement and as deposed by me in my earlier statement, I say that in the beginning stages, during the year 2003, myself and Shri Nandgopal @ Gopi had together formed a partnership firm M/s GNG & Co. This firm was engaged in doing job work for a company which was supplying exercise equipment "Surya Namaskar" to M/s Telebrands (India) Pvt. Ltd. I say that the said firm M/s GNG & Co. was located at Devidayal Estate, Bhandup, which is in the same locality where the premises of M/s Telebrands (India) Pvt. Ltd. is also situated. I say that during this period, we came in contact with Shri Hitesh Israni, who is the Managing Director of M/s Telebrands. I say that Shri Hitesh Israni was to launch a new product, also an exercise equipment, which is popularly sold by M/s Telebrands under the name AB KING PRO. I say that he was on the lookout for manufacturers who were competent to supply this equipment to M/s Telebrands. I say that due to our acquaintance with M/s Telebrands, we were offered the contract to supply this exercise equipment to M/s Telebrands. I say that on the basis of sample provided by M/s Telebrands and on the basis of the moulds supplied by M/s Telebrands, Shri Gopi and myself identified certain job workers, who were located in and around Saki Naka, who were competent to do the work of pipe bending, welding, powder coating etc. After identification of the job workers, we also identified certain suppliers of the main raw material required, like MS Pipes of various sizes, PVC coated fabrics, plywood supplier etc. Subsequently, we manufactured this exercise equipment in our firm M/s GNG & Co, which was supplied to M/s Telebrands. I here want to clarify that at the time of clearance of the exercise equipment, there was no brand name or trade name affixed by us. equipment was delivered to M/s Telebrands in loose condition. I further say that as explained by me in my earlier statement, the main raw material, MS Pipe is bent to

required shape, welded, powder coated and this material was received at our factory premises at Bhandup. Here, the parts were assembled with the help of screw driver and a few other tools. I say that after our supply passed the quality test of M/s Telebrands, they placed bulk orders on us. However, there was certain mis-understanding between Shri Gopi and myself on the financial aspects of M/s GNG & Co., due to which we decided to part ways and start the manufacturing activities in our individual firms. After taking this decision, I say that I started a firm by name of M/s Balarajeshwar & Co., in the year 2004 and Shri Gopi also started a firm by name M/s Vijaylaxmi & Co. I say that we still operated the firm GNG & Co. after these firms were floated, but as per mutual understanding, we did not do any manufacturing activity in this firm. M/s GNG & Co. was exclusively into local trading and imports. I say that Shri Hitesh Israni, due to the growing popularity of the exercise equipment, AB KING PRO, was demanding higher quantities of supplies of the same, and he also wanted that the entire production should not be in the control of one or two individuals. He informed myself and Shri Gopi that he wanted to place orders on other firms. However, myself and Gopi, mutually agreed that the margin available on the manufacture of the exercise equipment is good and the manufacturing process also does not require any technical expertise. Hence, as per our mutual understanding, we introduced persons known to us to Shri Hitesh Israni, after getting their consent to become manufacturer of the exercise equipment. I say that during period. we had introduced Shri Naresh Dedhia, who was the job worker, doing the powder coating jobs for us, as he was already conversant with the processes involved. The relatives of Shri Gopi, Shri G. Konnayan, Shri Venkataraman and Smt. Tejas Venkataraman were also introduced and they conducted the manufacturing activity of making and supplying exercise equipment to M/s Telebrands through their respective firms Ms GEF KAY & Co, M/s Venkateshwara Enterprises and M/s Shreenath Enterprises respectively. One more person, Shri Subburaj Perumal, known to Shri Gopi was also introduced and he is the proprietor of the firm M/s Ganesh Enterprises, which has also supplied exercise equipment to M/s Telebrands. I say that Shri P. Ganeshkumar, who was earlier doing job work of welding for us, was also offered the opportunity to start his manufacturing activity, which he accepted, and started supplying to M/s Telebrands. My attention is now invited to the statement of Shri Nandgopal @ Gopi, dated 19.03.08, wherein he has stated that Shri Prakash Pandya will be

in a position to explain details about M/s Ganesh Enterprises. I have also been shown the statement dated 03.10.07 of Shri Subburaj Perumal of M/s Ganesh Enterprises. I have carefully read these two statements and I have put my dated signature on both these statements in token of having read them carefully today. I have also been shown the statement dated 16.10.07 of Shri Sunil Alwani, of M/s Sunil Enterprises, supplier of PVC Coated fabrics. I have carefully read this statement and put my dated signature on it today in token of having read it carefully. My attention is now invited to the statement of Shri Sunil Alwani, wherein he has stated that M/s Ganesh Enterprises was represented by Shri Gopi and Shri Prakash. I have now been asked to clarify on this statement. After careful perusal of this statement I say that myself and Shri Gopi may have initially introduced Shri Subburaj Perumal to Shri Sunil Alwani, for arranging supply of raw material to his firm. My attention is now invited to the statement of Shri Subburaj Perumal, wherein he has stated that though there are different addresses shown for manufacturing of the exercise equipment, the actual manufacturing process took place at Panna House, Devidayal Compound. On being specifically asked, I say that I have no comment to offer on this. It is now specifically put to me that Shri Gopi has stated that Shri Prakash Pandya will be in a position to explain the transactions of M/s Ganesh Enterprises, Shri Sunil Alwani has stated that M/s Ganesh Enterprises was represented by Shri Gopi and Shri Prakash and Shri Subburaj Perumal, the so called proprietor of M/s Ganesh Enterprises has stated that the entire manufacturing activity of M/s Ganesh Enterprises had taken place at Panna House, Devidayal Estate, Bhandup, which is the place where Ms Balarajeshwar & Co. is also situated. It is hence put to me now that M/s Ganesh Enterprises was only a name used and the production was of my firm. M/s Ganesh Enterprises was just a dummy firm formed. To this, I say that I am not in a position to explain the reasons why these persons have stated the details provided by them in their respective statements. I am also not in a position to deny the same. I have nothing more to add at present. The above statement has been typed on the office computer on my request. I have carefully read this statement and I say that it is correctly recorded as stated by me. It is my voluntary statement and no force or threat was used for recording it."

4.8 From the above statements and various documentary evidences referred in the impugned order, in our view the fact that the appellants

namely M/s Vijaylakshmi & Co through its proprietor was engaged in the supply of the gymnasium equipments to M/s Telebrands and in order to keep his turnover below the exemption limits as per the Notification No 8/2003-CE had floated/ used the names of the proprietary concerns created/ operated in the name of his family members and employees. In fact if the corporate veil is lifted we are firmly of the view that M/s Vijaylakshmi & Co through its proprietor Shri G Nandgopal was person responsible for manufacture and clearance of the gymnasium equipments manufactured and cleared from these units.

4.9 From the facts as stated in the statement of Shri Prakash Pandya proprietor of M/s Balarajeshwar & Co and Shri P Subbaraju of M/s Ganesh Enterprises it is evident that M/s Ganesh Enterprise was nothing a front/ dummy created and used by Shri Prakash Pandya proprietor of M/s Balarajeshwar & Co, to suppress his turnover and claim the exemption under notification No 8/2003-CE dated 01.03.2003. Documentary evidences relied in the impugned order also suggest the same.

4.10 M/s Appellants have challenged the findings recorded in the impugned order, specifically citing the judgements wherein it has been held that the financial flow-back has to be established before the clearance of the various units can be clubbed. However we are not in agreement with the above submissions for the reason that the issue involved in the present case is not of the clubbing of clearance of distinct manufacturing units, but is the case wherein persons involved in manufacture and clearance of the goods is found to be one. Instead of treating as case of clubbing, the present case is a case where in the corporate veil needs to be lifted to determine who is the person involved in the manufacture and clearance of the goods, in the name of various units which may be dummy or otherwise. If on lifting the corporate view it is found that the same person is undertaking the manufacture and clearance of goods by utilizing the name of various entities, the clearances made in the name of various entities are to be treated as clearances made by that person. The findings recorded by the Commissioner on the issue of the clubbing of clearance and suppression of facts find support from the decisions as follows:

4.11 In the case of Calcutta Chromotype Ltd. [1998 (99) ELT 202 (SC)], Hon'ble Supreme Court 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 travelled 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. McDowell 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.

4.12 Following this decision tribunal has in case of British Scaffoldings India Pvt Ltd. [2014 (313) E.L.T. 87 (Tri - Del)] affirmed by Hon'ble Supreme Court as reported at [2015 (325) E.L.T. A145 (S.C.) 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. Skipe 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."

4.13 Hon'ble Bombay High Court has in the case of *Sunsuk Industries [2018 (16) GSTL 469 (Bom)]* held as follows:

*"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."

4.14 In case of Amar Enterprises [2017 (347) ELT 548 (T-Del)] held as follows:

"11.1.3 After having gone through the facts on record and the submissions of both sides, we are of the considered view that manufacture and clearances made by the respective noticees/appellants - M/s. Atlantic Chemical Industries, M/s. Foamsil Chemicals (not appellant here) and M/s. Arun Chemicals for the item namely RBA availing the benefit of Notification No. 175/86-C.E. (1/93-C.E. later) have to be clubbed together as we hold that these units are one and the same, when their operations are under common management and financial control and have mutuality of financial interest with each other. When it is so, then we agree with the findings of the impugned order.

11.1.4 Hon'ble Supreme Court's decision in the case of Calcutta Chromotype Ltd. v. C.C.E., Calcutta - 1998 (99) E.L.T. 202 (S.C.) had observed that depending upon the facts and circumstances of the case, veil of the company has to be lifted to find the real facts. In the present case also, three units namely, M/s. Atlantic Chemical Industries, M/s. Foamsil Chemicals and M/s. Arun Chemicals, whatever is their constitution, (these are proprietary concerns), are under common management and closely controlled by only one person Shri J.S. Jain, who is one of the appellants here. The facts and circumstances have warranted to examine the reality of these units; and after going behind the mask of these entities, it has been revealed that activities of these units i.e. manufacture, clearance, etc. has to be clubbed together. In this regard, we take support from the Hon'ble Supreme Court's observations in the above case of Calcutta Chromotype Ltd. (supra) which are given below :

14.

(emphasis supplied)

11.1.5 We do not agree with the appellants' contentions that impugned order has fixed liabilities of Central Excise duty separately on the noticee/appellant, namely, M/s. Atlantic Chemical Industries, M/s. Foamsil Chemicals (who is not the appellant) here and M/s. Arun Chemicals and have held that their clearances are to be clubbed whereas the impugned order concludes that M/s. Arun Chemicals had

no manufacturing facilities and if it is so, how liability could be fixed against M/s. Arun Chemicals.

11.1.6 In the peculiar facts and circumstances of the case, we agree with the conclusion of the impugned order that these three firms are one and the same; their clearances are to be clubbed, as discussed earlier. Regarding the submission that M/s. Arun Chemicals had got no manufacturing activity, it may be mentioned that both M/s. Foamsil Chemicals and M/s. Arun Chemicals have been actively involved in the operations of wrongly availing exemption under Notification No. 175/86-C.E. by 'artificial fragmentation when there was no distinction in management of the firms'. Therefore, M/s. Arun Chemicals (who is one of the appellants) deserves to be penalized under Rules 9(2) and 173Q of Central Excise Rules. We are giving no specific findings on M/s. Foamsil Chemicals as they are not the appellant here.

11.1.7 From the facts (impugned order Para 99), it is clear that noticee appellants M/s. Atlantic Chemicals played a major role in the manufacturing of the item RBA. Many of the machinery items and facilities for manufacturing are available only with M/s. Atlantic Chemicals. Therefore, after clubbing of clearances of the subject three units, liabilities for payment of duty of Central Excise is hereby fixed on M/s. Atlantic Chemicals. Consequently, the appellant M/s. Atlantic Chemicals is to pay total duty of Central Excise of Rs. 71,06,066/- (i.e. Rs. 38,45,363/- + Rs. 31,39,343/- + Rs. 1,21,360/-) for the RBA manufactured and cleared during 1989-90 to 1993-94. In this regard, corresponding penalty of Rs. 70,20,000/- is also imposed on M/s. Atlantic Chemicals under Rules 2(2) and 173Q of C. Excise Rules. Further M/s. Arun Chemicals have been involved in continuing this operation of wrongly claiming exemption Notification No. 175/86-C.E.; therefore, the penalty of Rs. 1,20,000/- imposed on them is hereby sustained."

4.15 In case of Sanjay Steel Co. [1996 (84) E.L.T. 307 (Tribunal)] following has been held:

"8. Shri Sanjeev Sachdeva, the learned SDR submitted that the product was manufactured by the three units on the directions of M/s. Lakme Ltd., Bombay as the units were only doing trading activities; that they had taken this activity of manufacture only for a short duration; that the entire product of the three units was purchased by M/s. Lakme Ltd.; that Shri Manish R. Patel, in his statement stated that they have

manufactured Lavender Beauty Talcum Powder for M/s. Lakme Ltd.; that this is a part of his statement recorded on 7-9-1987; that Shri Jayant Divekar confirmed that formula, specification, tins and standard to be maintained were provided by M/s. Lakme Ltd.; that M/s. Dhiraj Can Co., Ankleshwar had written a letter to M/s. Sanjay Steel Co., Ahmedabad that the return of the above consignment was an arrangement between M/s. Lakme Ltd. and as such no freight involved in this respect can be paid by us; that this reveals that the entire portion was under the control and supervision of M/s. Lakme Ltd.; that the price charged by the three units cannot be accepted under Section 4 of the CESA, 1944.

9. On careful consideration of the submissions made by both sides and the documents referred to , we find that the three units got activated only for a short period of one month or so. We also find that the main activity of the three units was trading activity in steel products. We also find that the three units do not have permanent machinery. We also observe that machinery was taken on hire only for the manufacture of lavender beauty talcum powder. We also find that this arrangement was done through Consultancy Agency which were connected with M/s. Lakme Ltd. We also observe that when the officers visited the premises declared by the three units, there was no plant, no machinery, no raw material or finished product which could indicate that the three units were engaged in the normal course in the manufacture of talcum powder. This clearly shows that these three units came into existence only for manufacture of lavender beauty talcum powder which is the brand name of M/s. Lakme Ltd. We therefore, hold that the three units are the dummies of M/s. Lakme Ltd.

10. The second question was whether the three units were entitled to the benefit of notification No. 140/83, we find that Clause (4) of this Notification reads :

4. Nothing contained in this Notification shall apply,

(i) if the aggregate value of clearances of all excisable goods from any factory by or on behalf of one or more manufacturer for home consumption, during the preceding financial years had exceeded rupees twenty lakhs,

(ii) if the aggregate value of clearances of the said goods from any factory by or on behalf of one or more manufacturers, for home

consumption, during the preceding financial year, had exceeded rupees fifteen lakhs."

We find that this Clause is a specific inasmuch as the clubbing of clearances of excisable goods is concerned, it was argued before us, that the three units were independent and they had filed the declaration required under Central Excise Rules for availing the benefit of exemption Notification. In the preceding paragraph, we have already held that the three units were not independent insofar as the manufacture of talcum powder for M/s. Lakme Ltd. is concerned. The three units came into existence when they got an order from M/s. Lakme Ltd. for manufacture of their lavender beauty talcum powder and they closed when the order was over. The three units, we have already held, are dummies of M/s. Lakme Ltd. Having held so, we hold that Clause (4) of Notification No. 140/83 is fully applicable. Having held so, we find that the benefit under the aforesaid notification was wrongly availed of by the three units.

11. On the question of limitation, the learned Counsel submitted that even if it is presumed that the three units were dummies of M/s. Lakme Ltd., the demands were time barred inasmuch as they were raised for a period much beyond six months. He submitted that the declaration was filed by the three units stating that they were manufacturing talcum powder. It was therefore, necessary for the Department to verify the declarations and there was no suppression by the appellants of any fact from the Department. He therefore, submitted that the demand beyond six months cannot be enforced under the provision of Section 11A of CESA, 1944. We find that the period for which the demands have been raised is between 26-12-1985 to 20-1-1986 of M/s. Zenith Enterprises, 30-1-1986 to 21-2-1986 for M/s. Sanjay Steel Co. and 26-2-1986 to 16-3-1986 for M/s. Shalin Cosmetics whereas the show cause notice was issued on 6-9-1990. We also observe that in the show cause notice, there is an imputation that there was suppression of material facts and misstatement inasmuch as the three units did not disclose that they were manufacturing the product for M/s. Lakme Ltd. The learned Counsel for the appellants agitated before us very forcefully that the three units had submitted the declarations which were required under the law and that in view of that declarations there was no suppression as the product was clearly declared. But here we are not considering whether the product was clearly declared or not. We are considering whether the relationship between the three units and M/s. Lakme Ltd.

was at all disclosed or not. Specifically in view of the fact that there was an agreement and whether the relevant clauses of the agreement were disclosed to the Department or not. We find that this relationship was not disclosed nor was a copy of the agreement sent to the Department along with the declaration and therefore, we hold that there was suppression of material facts. Now to examine whether this was done with the intention to evade payment of duty, we find that this arrangement was thought of only to evade payment of duty. This is very clear from the statement of Shri Manish R. Patel and Shri Jayant Divekar. Having regard to the submissions made before us, we hold that there was suppression of material facts and therefore, the demand for a period of five years can be raised. As the show cause notice was issued on 6-9-1990 and the period was after 26-12-1985, we hold that the entire demand is within time.”

4.16 In the case of Modi Alkalies [2004 (171) E.L.T. 155 (S.C.)] Hon'ble Supreme Court has held as follows:

“8. 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."

4.17 The reasons recorded by the Commissioner for not allowing the cross examination as requested finds support from the decision of Hon'ble Supreme Court in Case of K I Pavunny [1997 (90) E.L.T. 241 (S.C.)] wherein following has been held:

"26. In Naresh J. Sukhawani v. Union of India - 1996 (83) E.L.T. 258 (S.C.) = 1995 Supp. 4 SCC 663 a two-Judge Bench [to which one of us, K. Ramaswamy, J., was a member] had held in para 4 that the statement recorded under Section 108 of the Act forms a substantive evidence inculcating the petitioner therein with the contravention of the

provisions of the Customs Act as he had attempted to export foreign exchange out of India. The statement made by another person inculcating the petitioner therein could be used against him as substantive evidence. Of course, the proceedings therein were for confiscation of the contraband. In Surjeet Singh Chhabra v. Union of India - 1997 (89) E.L.T. 646, decided by a two-Judge Bench to which one of us, K. Ramaswamy, J., was a member the petitioner made a confession under Section 108. The proceedings on the basis thereof were taken for confiscation of the goods. He filed a writ petition to summon the panch (mediater) witnesses for cross-examination contending that reliance on the statements of those witnesses without opportunity to cross-examine them, was violative of the principle of natural justice. The High Court had dismissed the writ petition. In that context, it was held that his retracted confession within six days from the date of the confession was not before a Police Officer. The Custom Officers are not police officers. Therefore, it was held that "the confession, though retracted, is an admission and binds the petitioner. So there is no need to call Panch witnesses for examination and cross-examination by the petitioner". As noted, the object of the Act is to prevent large-scale smuggling of precious metals and other dutiable goods and to facilitate detection and confiscation of smuggled goods into, or out of the country. The contraventions and offences under the Act are committed in an organised manner under absolute secrecy. They are white-collar crimes upsetting the economy of the country. Detection and confiscation of the smuggled goods are aimed to check the escapement and avoidance of customs duty and to prevent perpetration thereof. In an appropriate case when the authority thought it expedient to have the contraveners prosecuted under Section 135 etc., separate procedure of filing a complaint has been provided under the Act. By necessary implication, resort to the investigation under Chapter XII of the Code stands excluded unless during the course of the same transaction, the offences punishable under the IPC, like Section 120B etc., are involved. Generally, the evidence in support of the violation of the provisions of the Act consists in the statement given or recorded under Section 108, the recovery panchnama (mediator's report) and the oral evidence of the witnesses in proof of recovery and in connection therewith. This Court, therefore, in evaluating the evidence for proof of the offences committed under the Act has consistently been adopting the consideration in the light of the object

which the Act seeks to achieve.”

4.18 In case of Telestar Travels Pvt Ltd. [2013 (289) ELT 3 (SC)] Hon'ble Supreme Court has held as follows:

“11. The Tribunal has relying upon the decision of this Court in K.T.M.S. Mohd. v. Union of India - (1992) 3 SCC 178, K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin - (1997) 3 SCC 721 = 1997 (90) E.L.T. 241 (S.C.) held that retracted statements could furnish a sound basis for recording a finding against the party making the statement. There is, in that view, no gainsaying that the Adjudicating Authority and the Appellate Tribunal have both correctly appreciated the legal position and applied the same to the case at hand, while holding that the statements were voluntary and, therefore, binding upon the appellants. Decision of this Court in Vinod Solanki v. Union of India & Anr. (2008) 16 SCC 537 = 2009 (233) E.L.T. 157 (S.C.) = 2009 (13) S.T.R. 337 (S.C.) relied upon by Mr. Diwan does not lend any help to the appellants. The decision is an authority for the proposition that a person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by an inducement, threat or promise by a person in authority. The burden is on the authority/prosecution to show that the statement sought to be relied upon was voluntary and that the Court while examining the voluntariness of the statement is required to consider the attending circumstances and all other relevant facts. The decision does not hold that even when a statement is founded upon consideration of the relevant facts and circumstances and also found to be voluntary, it cannot be relied upon because the same was retracted. We may usefully refer to the legal position stated in the following paragraph by this Court in K.T.M.S. Mohd. & Anr. (supra) :

“34. We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Custom Authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected brevi manu. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat,

promise etc. to establish that such improper means has been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law, this Court in several decisions has ruled that even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the FERA or the Customs Act etc. the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order will be vitiated..."

(emphasis supplied)

18. *There is, in our opinion, no merit even in that submission of the learned counsel. It is evident from Rule 3 of the Adjudication Rules framed under Section 79 of the FERA that the rules of procedure do not apply to adjudicating proceedings. That does not, however, mean that in a given situation, cross examination may not be permitted to test the veracity of a deposition sought to be issued against a party against whom action is proposed to be taken. It is only when a deposition goes through the fire of cross-examination that a Court or Statutory Authority may be able to determine and assess its probative value. Using a deposition that is not so tested, may therefore amount to using evidence, which the party concerned has had no opportunity to question. Such refusal may in turn amount to violation of the rule of a fair hearing and opportunity implicit in any adjudicatory process, affecting the right of the citizen. The question, however, is whether failure to permit the party to cross examine has resulted in any prejudice so as to call for reversal of the orders and a de novo enquiry into the matter. The answer to that question would depend upon the facts and circumstances of each case. For instance, a similar plea raised in *Surjeet Singh Chhabra v. Union of India and Ors.* (1997) 1 SCC 508 = 1997 (89) E.L.T. 646 (S.C.) before this Court did not cut much ice, as this Court felt that cross examination of the witness would make no material difference in the facts and circumstances of that case. The Court observed :*

“3. It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call panch witnesses for examination and cross-examination by the petitioner.”

19. We may also refer to the decision of this Court in M/s. Kanungo & Company v. Collector of Customs and Ors., (1973) 2 SCC 438 = 1983 (13) E.L.T. 1486 (S.C.). The appellant in that case was carrying on business as a dealer, importer and repairer of watches in Calcutta. In the course of a search conducted by Customs Authorities on the appellant's premises, 280 wrist watches of foreign make were confiscated. When asked to show cause against the seizure of these wrist watches, the appellants produced vouchers to prove that the watches had been lawfully purchased by them between 1956 and 1957. However, upon certain enquiries, the Customs Authorities found the vouchers produced to be false and fictitious. The results of these enquiries were made known to the appellant, after which they were given a personal hearing before the adjudicating officer, the Additional Collector of Customs. Citing that the appellant made no attempt in the personal hearing to substantiate their claim of lawful importation, the Additional Collector passed an order confiscating the watches under Section 167(8), Sea Customs Act, read with Section 3(2) of the Imports and Exports (Control) Act, 1947. The writ petition filed by the appellant

to set aside the said order was allowed by a Single Judge of the High Court on the ground that the burden of proof on the Customs Authorities had not been discharged by them. The Division Bench of the High Court reversed this order on appeal stating that the burden of proving lawful importation had shifted upon the firm after the Customs Authorities had informed them of the results of their enquiries. In appeal before this Court, one of the four arguments advanced on behalf of the appellant was that the adjudicating officer had breached the principles of natural justice by denying them the opportunity to cross-examine the persons from whom enquiries were made by the Customs Authorities. The Supreme Court rejected this argument stating as follows :

“12. We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show-cause notice issued on August 21, 1961, all the material on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant.”

20. Coming to the case at hand, the Adjudicating Authority has mainly relied upon the statements of the appellants and the documents seized in the course of the search of their premises. But, there is no dispute that apart from what was seized from the business premises of the appellants the Adjudicating Authority also placed reliance upon documents produced by Miss Anita Chotrani and Mr. Raut. These documents were, it is admitted disclosed to the appellants who were permitted to inspect the same. The production of the documents duly confronted to the appellants was in the nature of production in terms of Section 139 of the Evidence Act, where the witness producing the documents is not subjected to cross-examination. Such being the case, the refusal of the Adjudicating Authority to permit cross examination of the witnesses producing the documents cannot even on the principles of

Evidence Act be found fault with. At any rate, the disclosure of the documents to the appellants and the opportunity given to them to rebut and explain the same was a substantial compliance with the principles of natural justice. That being so, there was and could be no prejudice to the appellants nor was any demonstrated by the appellants before us or before the Courts below. The third limb of the case of the appellants also in that view fails and is rejected.”

4.20 In view of the discussions as above we are of the view the appellants namely M/s Vijaylakshmi & Co and M/s Balarajeshwar & Co, have in fact suppressed their turnover under the cover of corporate veil to avail the exemption under notification no 8/2003-CE dated 01.03.2003, knowingly. Hence their intention to evade payment of duty by resorting to suppression, misstatement is established beyond doubt accordingly the extended period of limitation as provided by proviso to section 11A (1) is correctly invoked for demanding the duty in the impugned order. The decisions relied upon by the appellant counsel on the issue of limitation would not be applicable to the present set of facts. Existence of the ingredients as per the proviso to Section 11A (1) is a question of fact and needs to be determined on the basis of the facts of each case.

4.21 As we hold that the ingredients as per proviso to section 11 A (1) are present in the case for invoking extended period of limitation, the natural consequence is imposition of penalty as per Section 11AC as has been held by the Hon'ble Supreme Court in the case of Rajasthan Spinning and Weaving Mills [2008 (239) ELT 3 (SC)].

“17. The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.

18. One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : “...by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...”. In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in

the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assesseees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.

19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section."

4.22 As the penalty equivalent to the duty sought to be evaded has been imposed on the appellants namely M/s Vijaylakshmi & Co and M/s Balrajeshwar & Co, under Section 11AC of Central Excise Act, 1944, imposition of the same penalties on Shri G Nandgopal proprietor of M/s Vijaylakshmi & Co and Shri Prakash Pandya proprietor of M/s Balrajeshwar & Co., under Rule 26 of the Central Excise Rule, 2002 cannot be justified. The said penalties imposed under Rule 26 are thus set aside.

4.23 In our view other appellants have actively participated and abetted the act of Shri G Nandgopal and Shri Prakash Pandya leading to evasion of the central excise duty the penalties imposed on them under Rule 26 of the Central Excise Rules, 2002 is also justified. Further we find the quantum of penalty imposed also is not very excessive but is reasonable looking into the gravity of offence perpetrated, in their name.

4.23 We summarize our findings in respect of the appeals as follows:

- a. Appeals filed by M/s Vijaylakshmi & Co (Appeal No E/1168 /2011) and M/s Balrajeshwar & Co. (Appeal No E/1169/2011) are partly allowed to the extent of setting aside the penalties imposed on the proprietors of the said concern namely Shri G Nandgopal and

Shri Prakash Pandya under Rule 26 of the Central Excise Rules, 2002.

- b. Appeals filed by the appellants namely M/s B N Enterprises (Appeal No E/1177/2011), M/s GEE Kay & Co (Appeal No E/1180/2011), M/s Venkateshwara Enterprises (Appeal No E/1178/2011), M/s Shreenath Enterprises (Appeal No E/1176/2011), M/s Shree Engineering Works (Appeal No E/1179/2011) and M/s Ganesh Enterprises (Appeal No E/1175/2011) are dismissed.

5.1 Appeals are disposed off as indicated in para 4.23 above.

(Order pronounced in the open court on 25.04.2023)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)