ÄXITEM NO.1A   COURT NO.5   SECTION III
(FOR JUDGMENT)

S U P R E M E   C O U R T   O F   I N D I A
RECORD OF PROCEEDINGS
CIVIL APPEAL NO(s). 2694 OF 2006

AURANGABAD ELECTRICALS (P) LTD.   Appellant (s)

VERSUS

COMMISSIONER OF CENTRAL EXCISE & CUSTOMS   Respondent(s)
WITH
C.A. No. 2420/2006
C.A. No. 2693/2006
C.A. No. 2691/2006
c.a. No. 3860/2006

Date: 12/11/2010 These Appeals were called on for pronouncement of judgment today.

For Appellant(s)
M/S. K.J. John & Co.,Adv.

For Respondent(s)
Mr. B. Krishna Prasad,Adv.

Hon'ble Mr. Justice H.L. Dattu pronounced the judgments of the Bench comprising Hon'ble Mr. Justice D.K. Jain and His Lordship.

The Civil Appeals are allowed. Parties are directed to bear their own costs.

(VINOD LAKHINA)   (KUSUM GULATI)
Court Master   Court Master

(Two Signed reportable judgments are placed on the file)

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2694 OF 2006

Aurangabad Electricals (P) Ltd.   ......Appellant

Versus

The Commissioner of Central Excise and Customs,
Aurangabad   ......Respondent

WITH
CIVIL APPEAL NOS.2420 OF 2006, 2693 OF 2006 AND 2691 OF 2006

J U D G M E N T

H.L. Dattu, J.

1) In this batch of civil appeals, the appellants have challenged the common order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai in Appeal No.A/2287-2290/WZB/MUM/2005/C-III/EB dated 20.12.2005.

2) By consent of the learned counsel, we have taken Civil Appeal No.2694 of 2006 as the lead case.

3) M/s. Aurangabad Electricals Ltd. (for short 'M/s. Aurangabad EL') are appellants in this civil appeal. They are engaged in the manufacture of Motor Vehicle Parts namely 'Magneto Assembly' in their factory at Aurangabad. For manufacture of their final product, viz. Magneto Assembly, they purchase some of the inputs, namely, 'Pick-up Coil', com bush, charging coil etc. from M/s. Bajaj Auto Ltd. (for short 'M/s. Bajaj') on which appropriate duty is paid by M/s. Bajaj. The appellants had submitted price declarations applicable to Magneto Assembly, which were accepted by the department.

4) The main issue involved in these appeals is the valuation of Magneto Assemblies cleared by the appellants - M/s. Aurangabad EL to M/s. Bajaj and consequent short payment of duty thereon on account of not taking into account the total landed cost of the inputs supplied by M/s. Bajaj.

5) The Commissioner, Central Excise and Customs, Aurangabad (for short 'the Commissioner'), issued a show cause notice dated 27.04.2001, inter-alia alleging that the appellants have undervalued the Magneto Assemblies supplied to M/s. Bajaj during the period from April 1996 to December 2000. Accordingly, the appellant, M/s. Bajaj, Mr. Anil Mali, CEO of M/s. Aurangabad EL and Mr. Ranjit Gupta, Vice-President (Materials) of M/s. Bajaj were called upon to show cause as to why the differential duty specified in the notice should not be demanded and recovered under Section 11A of the Central Excise Act, 1944 (for short 'the Act') and why

interest and penalty should not be imposed under Sections 11AB and 11AC of the Act. The show cause notice was also issued to Mr. Anil Mali, Chief Executive Officer of the appellant, M/s. Bajaj and Mr. Ranjit Gupta of M/s Bajaj were asked to show cause as to why penalty should not be imposed under Rule 209 A of the Central Excise Rules, 1944 (for short 'the Rules').

6) The appellants had replied the show cause notice, inter-alia, contending that they have not undervalued their final products namely, Magneto Assembly, since the same are cleared in wholesale trade in accordance with proviso (i) to Section 4(1)(a) of the Act. They had also contended that they had cleared the Magneto Assemblies in accordance with approved price declarations and finalization of RT 12 return assessment. Therefore, show cause notice and the demands raised were barred by limitation under Section 11A(1) of the Act. The co-noticee, more or less on the same lines as the appellants, had objected to the show cause notice and had further submitted that the department has not produced any proof that the co-noticee was anyway connected with the alleged under-valuation of inputs which were cleared by M/s. Bajaj on payment of appropriate duty and it was also contended that the entire notice was based on assumption and presumption and, therefore, it could not be established that the co-noticee was concerned with the exercisable goods which he knew or had reason to believe were liable for confiscation. It was further contended that since there was no undervaluation of excisable goods, no penalty could be imposed by invoking Rule 209A of the Rules.

7) After adjudication, the Adjudicating Commissioner passed an Order-in-Original No.04/CEX/2002 dated 25.01.2002, inter-alia holding that the inputs supplied to appellants by M/s. Bajaj were under-valued, and consequently, Magneto Assemblies supplied to M/s. Bajaj have been under-valued leading to evasion of duty. It was also held that M/s.

Bajaj was incurring expenditure on account of freight/insurance, loading/unloading and handling charges etc. which, along with profit margins, had not been included in the landed cost of the inputs supplied to appellants. Further, M/s. Bajaj were supplying drawings/designs/specifications free of cost to appellants and upto 20% of the production cost of goods manufactured which were sold back to M/s. Bajaj, was being incurred by M/s. Bajaj. The Adjudicating Commissioner, accordingly, confirmed the differential duty demand of ‘ 84,27,889/- under Section 11A(2) of the Act read with Rule 9(2) of the Rules, and penalty of ‘ 69,72,104/- under Section 11AC of the Act. The Adjudicating Commissioner also imposed a penalty of ‘ 5,00,000/- on M/s. Bajaj, as well as personal penalty of ‘ 50,000/- on Mr.Ranjit Gupta, Vice-President of M/s. Bajaj and ‘ 25,000/- on Mr. A.R. Mali, Chief Executive Officer of M/s. Aurangabad EL, under Rule 209A of the Rules. The Adjudicating Commissioner also directed the Deputy Commissioner, Central Excise, Aurangabad II division to quantify the interest payable under Section 11AB of the Act and issue appropriate demand notice.

8) The appellants and other co-noticees, being aggrieved by the aforesaid order, preferred appeals before the Customs, Excise and Gold (Control) Appellate Tribunal (for short ‘the Tribunal’) under Section 35B of the Act. The Tribunal, by its order dated 20.12.2005 has remanded the matter to the Adjudicating Commissioner for re-computation of excise duty to be levied in the light of the decision of this Court in the case of CCE, Pune v. Dai Ichi Karkaria Ltd., 1999 (84) ECR 4 (SC). In so far as the penalties imposed on the appellants, the Tribunal being of the view that the same is excessive, has reduced the penalty from ‘ 69,72,104/- to ‘ 10 lakhs, and in so far as the penalties imposed on M/s. Bajaj and the other two

appellants, the Tribunal has confirmed the same.

9) We have heard Mr. Joseph Vellapally, learned senior counsel for the appellants and Mr. V. Shekhar, learned senior counsel for the Revenue. We do not propose to notice the submissions made by the learned senior counsel in view of the final order that we intend to pass in these appeals.

10) The main allegation against the appellants in the show cause notice issued was that the appellants are the manufacturers of Magneto Assemblies and are receiving inputs from M/s. Bajaj, which is the primary consumer of their goods at under-valued landed cost by not including the element of landed cost of inputs incurred on account of Sales Tax, Octroi, Freight, Insurance, loading, unloading and handling charges. The appellants are further undervaluing the clearances effected by them to M/s. Bajaj since the appellants are already receiving the price compensation in terms of inputs at reduced landed cost and thereby they are aiding each other for mutual business interest so that the production cost by both of them kept at minimum and central excise duty is discharged at a lower value.

11) The learned senior counsel for the assessee would submit that the adjudicating commissioner and the Tribunal has non-suited the appellants mainly on the ground that the appellants and M/s. Bajaj have neither supplied the details of final product and the landed cost of the material supplied during investigation nor in their reply to the show cause notice. It is also observed that the appellants did not produce any material/data as to actual expenses incurred on account of freight, loading, unloading charges, profit margin etc. The learned senior counsel would submit that the appellants could have supported their defence pleaded in their objections filed

to the show cause notice by producing relevant documents including the certificate issued by its chartered accountant but due to unavoidable and unforeseen circumstances, they could not produce the same. It is submitted that this lapse should not be put against the appellants and non-suit them only on this ground. In support of his submission, he would draw our attention to the Certificate issued by the Chartered Accountant in respect of valuation of normal price of Magneto Assemblies manufactured and sold by M/s. Aurangabad EL to M/s Bajaj in wholesale, which was in support of costing. The said Certificate issued by Mukund Mankar and Co., Chartered Accountant, points out freight charges incurred by M/s. Aurangabad EL for getting material from Bajaj to M/s. Aurangabad EL, as well as loading and unloading charges, consumables overheads and profit. If such payment was made, then the whole premises on which show cause notice issued pales into insignificance. The appellant had produced the Certificate along with the other papers filed before the Tribunal, may be after the appeals were heard and reserved for judgment. In the normal course, we would not have accepted either the submission of the learned senior counsel or we would have taken note of the Certificate. Keeping in view the well settled principles laid down by this Court that technicalities should not defeat rendering of complete justice to a litigant, we think it appropriate to remand the matter to the Tribunal to verify and consider whether the Certificate which is already placed on record by the appellant, would assist them in support of their defence.

12) In view of the above, we allow these appeals and set aside the order passed by the Tribunal and remand the matter back to the Tribunal to look into the certificate issued by Mukund Mankar and Co., Chartered Accountant and to determine if M/s. Aurangabad EL had actually incurred the

freight charges, loading and unloading charges, consumable overheads profit etc. and whether in the light of this, any of the orders made by the Adjudicating Authority would stand. Since we are remanding the matter for fresh disposal, we also permit both the parties to urge such contentions which are available to them, including the submissions made before us. In the facts and circumstances of the case, parties are directed to bear their own costs.

..................................J.
[D.K. JAIN]

..................................J.
[H.L. DATTU]

New Delhi,
November 12, 2010.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3860 OF 2006

The Commissioner of Central Excise, Aurangabad ....Appellant

Versus

M/s Bajaj Auto Ltd., Waluj, Aurangabad, through its Vice President (Materials) and Ors. ...Respondents

J U D G M E N T

H.L. Dattu, J.

1) The appellant, being aggrieved by the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai, (for short 'Tribunal') in Appeal No.A/75-78/WZB/06/C-II/EB dated 13.01.2006, is before us in this appeal filed under Section 130-E of the Customs Act, 1962 (hereinafter referred to as 'the Act').

2) The issue in this appeal relates to the valuation of aluminum castings manufactured by M/s. Anurang Engineering Co. Ltd. (for short 'Anurang') which in turn is based on the purchase price of aluminum ingots supplied by M/s. Bajaj Auto Ltd., Waluk, Aurangabad (for short 'Bajaj'). Anurang, who is Respondent no. 4 in this appeal, is engaged in the manufacture of aluminium castings, commonly known as "handle bar body", "crank case clutch", and castings used as motor vehicle parts, classifiable under Chapter Sub-heading 8708.00 and 8714.00 of the Central Excise Tariff Act, 1985. Bajaj, the Respondent no.1, was supplying inputs - aluminum ingots after purchasing the same from other manufacturers to Anurang for the relevant period under the cover of invoices issued under Rule 57F(2) and Rule 57(3) of the Central Excise Rules, 1994, after reversing the MODVAT credit availed on the said input.

3) A show cause notice dated 05.03.2001 was issued by the Commissioner of Customs and Central Excise, Aurangabad, in which it was alleged that Anurang was receiving inputs from Bajaj at an under-valued landed cost by not including expenses on account of sales tax, octroi, freight, insurance, loading-unloading charges and handling charges, and that Bajaj was charging only the basic price of such inputs equal to the basic price charged by the original manufacturers of the said inputs to Bajaj, and since the additional cost of loading-unloading, freight etc. was not included in the input supplied to Anurang, there was consequent reduction in the landed cost of such inputs. It was also alleged that the price charged by Bajaj was depressed price although the same was coloured as negotiated price and the price indicated in the purchase orders was influenced by the supply of inputs by Bajaj at a lower landed cost and by this business arrangement, Bajaj had compensated Anurang for depressed prices of Anurang's finished goods supplied to Bajaj. Thus, both

of them were aiding each other for mutual business interest so that the production cost of each other was kept at minimum and the Central Excise Duty was discharged at lower value. The view of the adjudicating authority was that the price charged in the Central Excise invoices by Anurang for their finished goods was not the sole consideration for sale, since the proportionate landed cost charges were not included by Bajaj which is additional consideration under Rule 5 of the Central Excise (Valuation) Rules, 1975. Hence, expenses incurred by Bajaj, in addition to the price, were required to be loaded in the assessable value for payment of Central Excise Duty. It was in these circumstances that they were asked to show cause why differential duty amounting to '27,71,594/- due to undervalued clearances of the finished goods effected during the period with effect from 02.06.1998 to 30.09.1999 should not be recovered under Proviso to Section 11AC(1) of the Act read with Rule 5 of the Central Excise (Valuation) Rules, 1975, why penalty under Section 11AC and interest under Section 11AB of the Act should not be levied and recovered and penalty under Rule 209A of the Central Excise Rules, 1944, should not be imposed and recovered from Respondent Nos. 1 to 3 viz. Bajaj, Sh.Ranjit Gupta, Vice President (Materials) of Bajaj and Sh. Anurag Naresh Chandra, Director of Anurang.

4) In reply to the notice, Bajaj had stated that the sale of inputs - aluminum ingots to Anurang was on the basis of fair market price mutually agreed between the parties. It also claimed that there was no provision in Central Excise Laws which imposed an obligation on a person to sell his goods at a particular price in such transactions. They also claimed that the notice and the demand therein was time-barred as it had been issued beyond the time prescribed under Section 11A of the Act (since the notice was for the period June 1998 to September 1999, and the

notice date was 05.03.2001 and was served by post on 22.03.2001), and that jurisdictional officers of the specific division of the Department were well aware of these facts, since both the units are situated under the jurisdiction of the same division. It was also contended that there was no deliberate suppression of facts, or mis-statements or intention to evade Central Excise Duty on their part. Anurang, in their reply, had stated that the price charged by Bajaj to them was for sale of ingots and similarly, final product sold by Anurang to Bajaj was contracted/negotiated prices and, therefore, they have not contravened any provisions of the Act and the Rules framed thereunder.

5) After adjudication, the adjudicating authority held that the prices charged by Anurang were depressed prices coloured as negotiated prices. Further, Bajaj was supplying drawings/designs/specifications free of cost to Anurang to get the goods manufactured according to their specifications from them, which the Department claimed was for aiding each other for mutual business interest so that the production cost of each other is kept at a minimum and the Central Excise Duty is discharged at a lower rate. The adjudicating authority has further observed that by providing inputs at lower landed cost and drawings and designs free of cost, Bajaj was incurring part of the production cost of the finished goods manufactured and supplied exclusively to it. Thus, the adjudicating authority has concluded that Anurang contravened Rule 5 of Central Excise (Valuation) Rules, 1975 read with Section 4 of the CE Act, and Rule 9 read with Rules 52A, 54, 173F and 173G of the CE Rules. Accordingly, the adjudicating authority vide Order-in-Original No. 12/CEX/2002 dated 31.03.2002, levied duty of ‘ 27,71,594/- under Section 11A(1), penalty of ‘ 27,71,594/- under Section 11AC, and interest under Section 11AB against the assessee -

Anurang. The adjudicating authority also imposed penalty on Bajaj of ` 2.7 lakhs, and personal penalties of ` 50,000 on Mr. Anurag Nareshchandra, Director, Anurang, and Mr. Ranjit Gupta, Vice-President, Bajaj, under Rule 209A of the Central Excise Rules, 1944.

6) Aggrieved by the said order, the parties before the adjudicating authority filed Appeal Nos.E/1817, 1879, 2142 and 2143/02 before the Tribunal. The Tribunal by its common Order No. A/75-78/WZB/06/C-II/EB dated 13.01.2006 has allowed the appeals and has set aside the order passed by the adjudicating authority. The Tribunal inter-alia adopted the following reasoning while allowing the appeal:

> "However, while adjudicating the matter the Commissioner, in para 16 of the order has observed that:
>
> "In this case there is no allegation that while paying duty on ingots under Rule 57F(3) M/s. Bajaj Auto Ltd. have undervalued the ingots. The payment of duty under this rule is not the subject matter, therefore, on this account the pleadings of the assessee and other notices are not relevant. This matter is regarding under valuation of final product".
>
> The above observations made by the Commissioner are in contrast to the findings arrived at by him. If the ingots have been sold at the correct value, how the value of the same can be enhanced at the manufacturers end by some hypothetical additions on various grounds. It is also on record that the statement of the Authorized Representative of M/s. Bajaj Auto Ltd. as also of M/S. Anurang Egg. Co. Ltd. are to the effect that the prices of ingots were negotiated prices. However the adjudicating authority has observed that though the prices were agreed but they were not genuine and were adopted for under valuation of the final product. This is nothing but self contradiction. In any case, we find that whatever duty was being paid by M/s. Anurang Engg. Co. Ltd. was being taken as credit by M/s. Bajaj Auto Ltd. thus leading to revenue neutral situation in which case the appellants cannot be attributed with any intention to evade payment of duty. The burden to prove under valuation is on the revenue and is required to be discharged by production of sufficient evidence. Ordinarily, the court, should proceed on the basis that the apparent tenor of the agreements reflected the real state of affairs and what is required to be examined is as to whether the revenue has succeeded in showing that the apparent is not real and the price shown in the invoice does not reflect the true price.

Nothing has been shown in the present case. The entire case is based on assumptions and presumptions as such we are of the view that the confirmation of duty against M/s. Anurang Engg. Co. Ltd. is not sustainable."

7) Mr. V. Shekhar, learned senior counsel for the Revenue submitted that Bajaj has under-valued inputs which were being sold to Anurang by incurring all the landed costs such as freight charges, loading, unloading and handling charges etc: Anurang in turn has sold the manufactured goods in its factory only to Bajaj after paying the Excise Duty under the Act. Therefore, the learned senior counsel would submit that since the inputs were received at a lesser price, the manufacturing cost would also be less and thereby Anurang has paid the lesser Excise Duty. It is also contended that it is for this reason the adjudicating authority has come to the conclusion that the declarations filed by Anurang under the Rules is misstatement of facts. Alternatively, it is contended that Bajaj while supplying the inputs to Anurang has undervalued the goods without including certain expenses incurred by it, which has resulted in short payment of Excise Duty by Anurang on its supply of manufactured goods to Bajaj. The learned counsel, in aid of his submission, has relied on the principles settled by this Court regarding the importance of landed cost of raw materials in determining assessable value of the manufactured goods, and according to him the same must be included in the value of the final product. He further submits that the concept of ‘revenue neutrality’ is not applicable in the present case, and that there were no contrary findings of the Commissioner in this regard. He also submits that the finding of the Tribunal that the findings and conclusions reached by the adjudicating authority is on mere assumptions and presumptions is erroneous. According to the learned counsel, the findings of the adjudicating authority was after thorough enquiry and investigation of

the records of the assessee and also based on the statements of the Vice President of Bajaj and Director of Anurang during investigation. The learned counsel further points out that the extended period of limitation as provided under Section 11 A(1) of the Act would come to the aid of the Department since the respondents did not disclose the correct facts before the Department with intention to evade payment of duty under the Act.

8) Per contra, Mr. Joseph Vellapally, learned senior counsel for the respondents would contend that the assumption of adjudicating authority that Anurang in their invoices has not given true and correct declaration, is not only contradictory but also not based on any evidence whatsoever. It is further contended that on mere presumption and assumption, the adjudicating authority cannot create demands under the Act and then proceed to recover them by adopting coercive measures. It is also contended that Bajaj and Anurang are under the jurisdiction of the same division and as such, it cannot be reasonable to conclude that the revenue was not aware of the transactions of both the units and therefore, the revenue cannot invoke the extended period of limitation to demand of duty under the Act.

9) The Tribunal, while considering the issue of limitation in the impugned order has concluded as under:-

> "Apart from the merit of the case we also note that the demand is hopelessly barred by limitation. Notice for the period June 1998 to September, 1999was issued on 05.03.2001. The ingots were being cleared by M/s Bajaj Auto Ltd. on their invoices and the final casting products were being cleared by M/s Anurag Engg. Co. Ltd. on proper invoices. Both the units are situated under the jurisdiction of same division and as such it cannot be reasonable concluded that revenue was not aware of the said transactions and the value of the same. As such we are of the view that the demand is also barred by limitation."

10) In our view, the aforesaid issue was one of the important

issues that fell for the consideration before the Tribunal. The Tribunal, in our view, while considering and deciding the same, has overlooked the language employed in the Statute. Therefore, we deem it proper to remand the entire matter to the Tribunal for reconsideration and decision not only on this issue, but also the other issues which were canvassed before us by learned senior counsel for the parties. Therefore, we now take up that issue for our consideration and decision.

11) As we have already observed, the Tribunal, while considering this issue, has neither looked into the ingredients of Section 11A of the Act nor the construction placed by this Court on this Section. Section 11A of the Act reads :-

> Section 11A. - Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. --
>
> (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
>
> Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason 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, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words one year, the words "five years" were substituted:
>
> Explanation. -- Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of [one year] or five years, as the case may be.
>
> (1A) When any duty of excise has not been levied or paid or has been short-levied or short paid or erroneously refunded, by reason of fraud, collusion or any wilful mis-statement or

> suppression of facts, or contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty, by such person or his agent, to whom a notice is served under the proviso to sub-section (1) by the Central Excise Officer, may pay duty in full or in part as may be accepted by him, and the interest payable thereon under section 11AB and penalty equal to twenty-five per cent of the duty specified in the notice or the duty so accepted by such person within thirty days of the receipt of the notice.

12) Section 11A of the Act empowers the central excise officer to initiate proceedings where duty has not been levied or short levied within six months from the relevant date. But the proviso to Section 11A(1), provides an extended period of limitation provided the duty is not levied or paid or which has been short-levied or short-paid or erroneously refunded, if there is 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. The extended period so provided is of five years instead of six months. Since the proviso extends the period of limitation from six months to five years, it needs to be construed strictly. The initial burden is on the department to prove that the situation visualized by the proviso existed. But the burden shifts on the assessee once the department is able to produce material to show that the appellant is guilty of any of those situations visualized in the Section.

13) Interpreting this provision, this Court in Collector of Central Excise, Hyderabad v. Chemphar Drugs and Liniments, Hyderabad, (1989) 2 SCC 127, held: (when the period prescribed was six months prior to it being made one year by the Finance Act, 2000, with effect from 12.05.2000):

> "In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section (1) of Section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons

> of either fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful mis-statement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case."

14) In the case of Cosmic Dye Chemical v. Collector of Central Excise, Bombay, (1995) 6 SCC 117, it is held:

> "Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" is again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11-A. Mis-statement or suppression of fact must be willful."

15) In Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut, (2005) 7 SCC 749, this Court has observed:

> "...we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression."

16) In our view, on a reading of the relevant provision the extended period of limitation as provided by the proviso to Section 11A(1) of the Act, can only be invoked when there is a conscious act of either fraud, collusion, wilful mis-statement, suppression of fact, o

r

contravention of the provisions of the Act or any of the rules made thereunder on the part of the person chargeable with duty or his agent, with the intent to evade payment of duty. In the present case, the Tribunal while considering this issue has not stated whether or not there were any such circumstances which would not allow the revenue to invoke extended period of limitation. It only observes in its order since both the assessees are situated under the jurisdiction of the same division and as such it cannot be reasonable to conclude that the revenue was not aware of the transactions. Since this is not what is envisaged under the proviso to Section 11A(1) of the Act, we cannot agree with the reasoning and the conclusion reached by the Tribunal.

17) In view of the above, we set aside the order passed by the Tribunal, and remand the matter to the Tribunal to determine whether on the facts of the case, any of the grounds enumerated in the proviso to sub-section (1) of Section 11A of the Act are made out by the Revenue and thereby the Revenue is justified in invoking the extended period of limitation to make demand of duty under the Act.

18) In so far as other issue that was canvassed by learned counsel for the Revenue, in our view, those are all disputed facts which require to be re-examined by the Tribunal, since the Tribunal under the Statute is the final fact finding authority.

19) In view of the above discussion, we allow this appeal and set aside the impugned order passed by the Tribunal and remand the matter for fresh consideration of all the issues raised by both the parties. Liberty is reserved to

both the parties to place on record such other material, which is available in their possession in support of their case. We clarify that we have not expressed any opinion on the merits of the claim of either of the parties in this appeal. In the facts and circumstances of the case, parties are directed to bear their own costs.

.............................J.

[D.K. JAIN]

.............................J.

[H.L. DATTU]

New Delhi,
November 12, 2010.