IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 96 OF 2014

Shri Dharampal Lalchand Chug }
Carrying on business in the name }
and style of M/s. Vibha Impex }
(100% EOU) Unit B as sole }
proprietor thereof and presently }
residing at 48, Janata Nagar-B, }
Behind Luthra Bunglow, New Civil }
Hospital Road, Bhatar Road, }
Surat – 395 002, Gujarat. } Appellant

versus

Commissioner of Central Excise }
Nashik, having its office at }
Kendriya Rajaswa Bhavan, }
Gadkari Chowk, Nashik – 422 002, }
Maharashtra } Respondent

WITH
CENTRAL EXCISE APPEAL NO. 182 OF 2014

Shri Kamal Lalchand Chug }
Carrying on business in the name }
and style of M/s. Jannat Fabrics }
(100% EOU) as a sole }
proprietorship thereof presently }
residing at 48, Janata Nagar – B, }
Behind Luthra Bunglow, New Civil }
Hospital Road, Bhatar Road, }
Surat – 395 002, Gujarat } Petitioner

versus

Commissioner of Central Excise }
Nashik, having its office at }
Kendriya Rajaswa Bhavan, }
Gadkari Chowk, Nashik – 422 002, }
Maharashtra } Respondent

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WITH
CENTRAL EXCISE APPEAL NO. 115 OF 2015

Shri Dharampal Lalchand Chug	**}**	
Carrying on business in the name	**}**	
and style of M/s. Vibha Impex	**}**	
(100% EOU) Unit A as sole	**}**	
proprietaryship thereof and	**}**	
presently residing at 48, Janata	**}**	
Nagar-B, Behind Luthra Bunglow,	**}**	
New Civil Hospital Road,	**}**	
Surat – 395 002, Gujarat	**}**	**Appellant**
versus		
Commissioner of Central Excise	**}**	
Nashik, having its office at	**}**	
Kendriya Rajaswa Bhavan,	**}**	
Gadkari Chowk, Nashik – 422 002,	**}**	
Maharashtra	**}**	**Respondent**

Mr. V. Sridharan-Senior Advocate with Mr.Prakash Shah, Mr. Jas Sanghavi and Mr.Akhilesh Kangasia i/b. M/s. PDS Legal for the Appellants.

Mr. S. S. Pakale with Mr. Neelesh Kalantri for the Respondent.

CORAM :- S. C. DHARMADHIKARI &
G. S. KULKARNI, JJ.

DATED :- JULY 10, 2015

ORAL JUDGMENT :- (Per S. C. Dharmadhikari, J.)

These Central Excise Appeals raise common questions and therefore were heard together. They can be conveniently disposed of by a common Judgment. The Appeals arise out of final orders passed by the Customs, Excise and Service Tax Appellate Tribunal, Bench at Mumbai dated 3rd July, 2013.

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2) The Appeals raise the following substantial questions of law:-

> "(a) Whether under the facts and circumstances, the Appellate Tribunal erred in confirming demand for period even beyond extended period of limitation i.e. five years from the date of issuance of the show cause notice?
>
> (b) Whether the Appellate Tribunal is correct to hold that relevant date for the purpose of computing period of limitation should be date of knowledge to the Central Excise Department under section 11A of the Central Excise Act, 1944?"

3) With the consent of the Advocates appearing for both sides, we have heard these Appeals finally at the admission stage itself. The facts necessary to appreciate the rival contentions are that the Appellant in Appeal No. 96 of 2014 is a sole proprietor carrying on business in the name and style of M/s. Vibha Impex and claims that it is a 100% Export Oriented Unit (EOU). The factory was earlier located at Malegaon and later on it shifted to another village but within the same district, namely, Nashik. The Appellant is engaged in the manufacturing of various types of Polyester Yarn and Fabrics falling under Chapter 54 of the First Schedule to the Central Excise Tariff Act, 1985. The Appellant was availing the exemption benefit under Notification 1/95-CE dated 1st April, 1995. The Appellant procured the raw material without payment of duty on the condition that the same will be used in the manufacture of final products for export. The Appellant had submitted an application to the Development Commissioner, SEEPZ, Special

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Economic Zone, Ministry of Commerce and Industry, Andheri (East), Mumbai 400 096, in order to setup a 100% EOU unit. The said Development Commissioner granted the permission on 9th November, 2001. The annual capacity for manufacture of yarn and fabrics was estimated at 3048.64 metric tons and 33,60,000 meters respectively. The Appellant also executed and submitted a letter of undertaking dated 26th March, 2002 in order to comply with the terms of the permission. The Appellant also obtained a Customs licence dated 28th January, 2002. The Appellant also executed a Bond in the sum of Rs. 80 lacs with the Deputy Commissioner of Central Excise and Customs, Division-III, Nashik in order to comply with the condition of manufacture under the Bond. The Appellant also requested the Development Commissioner, SEEPZ, Mumbai to change the name of the Appellant firm to M/s. Seven Star Tex Private Limited with new factory address. Accordingly, that permission was granted. Necessary changes were made in the licence and the permissions obtained earlier.

4) The period under consideration is April, 2002 to January, 2003. The Central Excise Department carried out a search of the Appellant's factory premises. In the course of the same, the Central Excise Department seized various documents for scrutiny under a panchanama drawn on 10th October, 2002. In the course of the search,

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the Central Excise Department alleged that the Appellant installed certain machines and there was a short payment of duty amounting to Rs.94,498/-. There are shortages noticed in the manufacture of Polyester Yarn. The Appellant paid a short payment of duty by Challan dated 11th January, 2002.

5) Thereafter, further investigations were carried out by alleging that the Appellant was clandestinely diverting the inputs, namely, Polyester Yarn procured which were intended to be used in manufacture of fabrics for export. These raw materials were procured without payment of Customs and Central Excise duties but came to be diverted. Thereafter as well, investigations were carried out. We are not concerned with the details of the investigations. Suffice it to note that every step of the above nature eventually led to issuance of show cause notice dated 27th November, 2009. That notice proposed to recover Central Excise Duty amounting to Rs.2,73,41,250/- for alleged diversion of inputs (Yarn), during the period April, 2002 procured without payment of duty under CT-3 procedure. The diversion into local domestic market is in utter violation of the terms and conditions of the Notification No. 1/95-CE dated 4th January, 1995 and the conditions of B-17 Bond executed. That is how the Central Excise duty and penalty was proposed to be recovered.

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6) We are not concerned with the merits of these allegations, for the simple reason that the only argument canvassed before us by Mr. Sridharan-learned Senior Counsel appearing for the Appellant is that the Tribunal, while confirming the order of the adjudicating authority lost sight of the fact that the demand raised in the show cause notice is barred by limitation prescribed in section 11A of the Central Excise Act, 1944.

7) This plea was specifically raised in the reply to the show cause notice by the Appellant. It was argued that the disputed period is April, 2002 to January, 2003. However, the show cause notice is dated 27th November, 2009. Therefore, even the extended period of five years is over. The show cause notice is issued after a long gap of six years. In the circumstances, the demand is time barred.

8) In dealing with such contentions, we find that the Tribunal referred to the allegations in the show cause notice, the findings and conclusions in the order-in-original. The Tribunal referred to the records and the details of the investigation. The Tribunal concluded that the documents prepared by the Appellant were found to be fake and ultimately in the year 2006, the evidence collected was put to the proprietors and they admitted the clandestine clearance of the goods without payment of duty. Therefore, the show cause notices were

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issued within five years from such development. None of the decisions relied upon by the Appellant therefore will be of any assistance. The Tribunal concluded that as the Appellants are not disputing the demands on merits before the adjudicating authority nor in the present Appeals, there is no substance in their contention that the demands are time barred. Concluding thus, the Appeals were dismissed. In the order-in-original as well, the adjudicating authority concluded that the demand is not time barred. The adjudicating authority found that the show cause notice is neither issued under section 11A(1) of the Central Excise Act, 1944 nor under section 28 of the Customs Act, 1962, wherein, there is limitation prescribed for issuance of show cause notice. The show cause notice has been issued for violation of the conditions of Notification No. 1/95 and the Bond. Upon such conclusion in para 4.18 of the order-in-original, the adjudicating authority concludes that the demand is not time barred.

9) Mr. Sridharan has assailed this part of the conclusion of the authorities and submitted that there is a error of law and apparent on the face of the record. Both, the adjudicating authority and the Tribunal lost sight of the fact that if there is a violation or breach of the condition of the Exemption Notification, whereby the duty demand arises and if that is not honoured, then, recovery proceedings can be

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initiated, but for that, there is a clear provision in the Central Excise Act, 1944. That provision ordinarily allows recovery of all duties which are found to have been levied but not paid, duties not levied or short levied or short paid or erroneously refunded. In the present case, if the breach and violation of the Notification attracts the situation where the duties levied are not paid, then, the legislature in terms of the statute permits the authorities to recover the amount of duty within one year. That is the ordinary and normal period of limitation. However, proviso to sub section (1) of section 11A clarifies that when any duty of excise has not been levied or paid or has been short levied or paid or erroneously refunded by reason of fraud, collusion or any willful 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, sub section (1) will have effect and for the words "one year" the words "five years" ought to be substituted. The *Explanation* in this case, according to Mr. Sridharan is not attracted. For, there is no stay against any recovery. In the present case, according to Mr. Sridharan, language of this provision postulates that the recoveries have to be made within the above period but from relevant dates. Mr. Sridharan submitted that this case is covered by section 11A(3)(ii) (C) of the Central Excise Act, 1944. He would submit that in the case of excisable goods on which duty has not

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been levied or has been short levied or short paid, then, the relevant date is the date on which duty is to be paid under the Act or rules made thereunder. This provision has a direct nexus or connection with the date of payment and as postulated by the Act and the Rules. In the circumstances, the demand raised in the present case is ex-facie time barred. Mr. Sridharan would submit that the concept of cause of action has been erroneously read in these provisions. The legislature has circumscribed and restricted the operation of this section. Mr. Sridharan has invited our attention to the report of the Select Committee and particularly clause 28 thereof, which records the Committee's opinion that some time limit should be laid down within which a notice may be served upon an importer or exporter, as the case may be, for payment of duty not levied, short-levied or erroneously refunded by reason of collusion or willful mis-statement or suppression of the facts on his part and the Committee finds that the period of five years would be adequate for this purpose. The clause therefore was amended accordingly. The proposal was that there shall be no time limit for issuance of notice of recovery in the cases noted above.

10) Mr. Sridharan submits that the understanding of the Tribunal in confirming the order of the adjudicating authority therefore would mean reading into the provision something which is not

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specifically there. Mr. Sridharan has invited our attention to the decisions relied upon by the Tribunal as also the adjudicating authority. He submits that these Judgments have been completely misread and misapplied. In both cases, the Hon'ble Supreme Court has concluded that the Revenue had adhered to the time schedule. The argument of time bar was negatived by finding that the extended period beyond one year was rightly invoked and applied. In none of these decisions the Hon'ble Supreme Court concluded that irrespective of what has been prescribed by law, the cause of action would be the determinative factor or the knowledge or detection of fraud would be the starting point. In the circumstances, according to Mr. Sridharan, the impugned orders deserve to be quashed and set aside.

11) Reliance is placed upon the Judgments of the Hon'ble Supreme Court of India, which have been interpreting section 11A. The principal amongst them are Judgments in the case of *J. K. Spg and Wvg Mills Ltd. vs. Union of India* reported in **1987(32) ELT 234**, *Ahmedabad Manufacturing and Calico Printing Co., Ltd. v. S.G. Mehta*, reported in **(1963) 48 ITR 154** and *S. S. Gadgil vs. Lal and Co.* reported in **(1964) 53 ITR 231**.

12) On the other hand, Mr. Pakale appearing for the Revenue submitted that the Tribunal's view reflects the correct understanding of

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the law. Mr. Pakale would submit that the distinction as made by Mr.Sridharan can be of no assistance in this case. Mr. Pakale's submission is that provisions in Chapter II of the Central Excise Act, 1944 are to enable collection of levy of duty. He would submit that sections 3, 4, 5 and 5A of the said Act should be read together. Reading of the same would disclose as to how, when there is Exemption Notification, the law postulates a inquiry into the violation or breach of the conditions upon which the exemption has been granted. If the breach or violation of the conditions of the Notification has to be probed and investigated, then, the duty liability would occur only after such probe or inquiry is complete. It is only thereafter that the fraud or willful suppression would come to the notice of the Revenue. It is only then the demand can be raised for payment of duty. Therefore, the words "is to be paid" appearing in the definition of the term "relevant date" in sub clause (C) of section 3(ii) of section 11A of the said Act will have to be interpreted accordingly. Further, Mr. Pakale has also relied upon a Judgment of the Hon'ble Supreme Court of India in the case of *Commissioner of Central Excise vs. Kalvert Foods India Pvt. Ltd.* reported in **2011 (270) ELT 643**. Mr.Pakale has pointed out that in the present case (CEXA/182/2014), the unit M/s. Jannat Fabrics claims to be a 100% EOU. Mr. Pakale submits that it was the intimation from the Development Commissioner on 28th December, 2006 which triggered

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the inquiry or investigation. There is an admission of the proprietor in his deposition dated 6th December, 2009 that Polyester Yarn has not been utilised or used in the manufacture of export goods. Therefore, the amount became payable under the provisions of the said Act, Rules, Notification and Bond. The show cause notice was issued on M/s.Jannat Fabrics on 23rd February, 2010. Mr. Pakale would rely upon this and the further date to submit that the time period has to be computed from the date on which the duty was to be paid. Mr. Pakale would submit that the limitation ought to be computed from the date of final removal of finished goods without payment of duty. The fraud was perpetrated by M/s Jannat Fabrics and it was discovered and came to the knowledge of Revenue only during investigation. Once the conditions of the Exemption Notification are not complied with then, the benefit of that Notification becomes unavailable. Then, the demand can be raised. In the present case, there is therefore no time limit. The provisions of section 11A of the Central Excise Act, 1944, in any event, would have to be construed and interpreted in this light.

13) Apart from the case of *M/s. Kalvert Foods India Pvt. Ltd.* (supra), reliance is placed upon a Judgment of Division Bench of this Court rendered in the case of *Commissioner of Customs (Import) vs. Wockhardt Hospital and Heart Institute; Grant Medical Foundation* in

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Customs Appeal Nos. 22 of 2004; 17 of 2005 decided on 28th April, 2006. This decision is reported in **2006 (200) ELT 15**. Though this decision was challenged in the Hon'ble Supreme Court of India, the Hon'ble Supreme Court has not reversed the view taken by the Division Bench of this Court but has interpreted the word "payable" in the light of the relevant statutory provisions is the submission. Mr. Pakale has also invited our attention to the compilation which was tendered by Mr. Sridharan and particularly the Central Excise Rules. Mr. Pakale submits that the language of the Rules would enable in this case to determine the time and manner of payment of duty. In the present case, Mr. Pakale would submit that this being a case of fraud, the law laid down in the case of *S. P. Chengalvaraya Naidu vs. Jagannath* reported in **1994 AIR (SC) 853** would apply.

14) With the assistance of Mr. Sridharan and Mr. Pakale, we have perused the paper book in this Appeal. We have perused the impugned orders and to the extent relevant for us. Before proceeding further, it would be necessary to reproduce section 11A of the Central Excise Act, 1944 as it stood then. The said section reads as under:-

> **"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

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rate of duty on or valuation of excisesable 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:

Provided further that where the amount of duty which has not been levied or paid or has been short-levied or short-paid or erroneously refunded is one crore rupees or less a notice under this sub-section shall be served by the Commissioner of Central Excise or with his prior approval by any officer subordinate to him:

Provided also that where the amount of duty which has not been levied or paid or has been short-levied or short-paid or erroneously refunded is more than one crore rupees, no notice under this sub-section shall be served without the prior approval of the Chief Commissioner of Central Excise.

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.

(2) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(2A) Where any notice has been served on a person under sub-section (1), the Central Excise Officer -

(a) in case 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, where it is possible to do so, shall

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determine the amount of such duty, within a period of one year; and

(b) in any other case, where it is possible to do so, shall determine the amount of duty of excise which has not been levied or paid or has been short-levied or short-paid or erroneously refunded, within a period of six months;
from the date of service of the notice on the person under sub-section (1).

(2B) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty before service of notice on him under sub-section (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid:

Provided that the Central Excise Officer may determine the amount of short payment of duty, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 1. - Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short-levied or was short-paid or was 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 thererunder with intent to evade payment of duty.

Explanation 2. - For the removal of doubts, it is hereby declared that the interest under section 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the Central Excise Officer, but for this sub-section.

(2C) The provisions of sub-section (2B) shall not apply to any case where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.

(3) For the purpose of this section, -
(i) "refund" includes rebate of duty or excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

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(ii) "relevant date" means; -

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid -

(A) where under the rules made under this Act a periodical return, showing particulars of the duty paid on the excisable goods removed during the period to which the said return relates, is to be filed by a manufacturer or a producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder

(b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund."

15) A perusal of the above section would reveal that the same confers powers for recovery of duty not levied or not paid or short levied or short paid or erroneously refunded. Sub section (1) clarifies that 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

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short paid or to whom the refund has erroneously been made, requiring him to show cause as to why he should not pay the amount specified in the notice. It is stated in the first proviso 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. There are two further provisions and which mandate that where the amount involved is Rs.1 crore or less, a notice under this sub-section shall be served by the Commissioner of Central Excise or with his prior approval by any officer subordinate to him and when it is more than 1 crore, no notice under this sub-section shall be served without the prior approval of the Chief Commissioner of Central Excise. The Explanation has no application to the present case. Various sub sections of this provision enable recovery of the amount after sub section (1) is complied with. Sub section (2A) enables determination of the amount of the duty within a period of one year in cases of fraud etc., whereas in other case it has to be within a period of six months. By sub section (2B), the person chargeable with the duty may pay the amount of duty before service of notice on him

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under sub section (1) in respect of the duty and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub section (1) in respect of the duty so paid. And by proviso to sub section (2B), it is stated that the Central Excise Officer may determine the amount of short payment of duty, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" referred to in sub-section (1) shall be counted from the date of receipt of such information of payment. Explanation 1 to sub section (2B) reads as under:-

> "*Explanation 1*. Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short-levied or was short-paid or was 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."

16) A perusal thereof would indicate as to how sub section (2B) will not apply in case where the duty was not levied or was not paid or was short levied or was short paid or was erroneously refunded by reason of fraud, collusion etc. Sub section (2C) states that the provisions of sub section (2B) shall not apply to any case where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President. For

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the purpose of section 11A, the term "relevant date" has been defined. Thus, a perusal of this section and carefully would denote that it enables recovery of duty not levied or not paid or short levied or short paid or erroneously refunded. The recovery is after issuance of a show cause notice within the meaning of sub section (1). The issuance of the show cause notice is permitted and within the period specified by sub section (1) and its proviso. However, the period has to be calculated and computed from the relevant date. The relevant date means in the case of excisable goods on which duty of excise has not been levied or paid or has been short levied or short paid and sub clause (A) of clause (ii) of sub section (3) states that whereunder the rules made under this Act a periodical return, showing particulars of the duty paid on the excisable goods removed during the period to which the said return relates, is to be filed by a manufacturer or a producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed. Where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules and in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder.

17) It is not necessary to decide any wider controversy or larger question. Mr. Pakale would submit that in the case of Exemption

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Notification, the relevant date would have to be computed consistent with the terms and conditions of the Exemption Notification. If they are breached or violated and such breach or violation is discovered or came to the knowledge of the Revenue, then, the computation will have to be done accordingly. Mr. Pakale relies on Explanation 1 to section 11A(2B) to support this contention. It is not possible to accept this contention and for more than one reason.

18) If the goods and which are excisable have to be cleared on payment of duty, but if they are exempted from payment of such duty, it does not mean that there is no power in the authorities to verify and scrutinise the documents based on which the clearance is made. One of the documents at the stage of clearance refers to the Exemption Notification and thereafter the person clearing the goods or removing them urges that there is no duty liability, then, what terms and conditions have been prescribed or whether the exemption is absolute are matters which are to be checked and determined by the authorities. We have not been showing any embargo or prohibition nor is it the contention of Mr. Pakale that when there is an exemption the goods can be cleared or removed without any scrutiny or that no scrutiny or verification is permissible in law. Mr. Pakale's reliance on the Central Excise Rules, 1944 and particularly Rules 9 and 49 would be enough to

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record this conclusion. Further, the terms and conditions of the Exemption Notification and the Bond would indicate as to how it is possible to ensure compliance of law at various stages. Thus, the Rules and Rule 173G(2A) read with the proviso thereto would indicate as to how goods which are exempted have to be removed and cleared. However, Mr. Pakale's reliance on para (d) of the Exemption Notification No. 54 and the Form B-17 (General Surety/Security) is entirely misplaced. By recourse to that, the period of limitation prescribed in section 11A of the Act cannot be enlarged. Once it is possible to scrutinise and verify the compliance of the terms and conditions on which the exemption has been issued in this case, then, it will not be possible to hold that a separate period is prescribed for recovery of duty in case of this nature or that the period of five years prescribed would have to be computed only when the breach or violation of the Exemption Notification has come to the knowledge of the Department subsequently. It may be that such fact is discovered or comes to the knowledge of the authorities subsequent to the clearance, however, when the Department desires to recover the amount of duty, then, it must adhere to the period prescribed. If the period is prescribed of five years and that has to be computed from the relevant date, then, we cannot read into this definition of the words “relevant date” something more as urged by Mr. Pakale. His argument that date on

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which the duty is to be paid under the Act must be construed with reference to sections 3, 4, 5 and 5A of the Central Excise Act, 1944 is equally unacceptable inasmuch as by section 2(d), the definition of the term “excisable goods” has been set out. “Excisable goods” means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt. Then, we find from a reading of section 3 which falls in the same Chapter that the same specifies the duties in the Schedule to the Central Excise Tariff Act, 1985 to be levied. Sub section (1) thereof provides that there shall be levied and collected in such manner as may be prescribed a duty of excise to be called the Central Value Added Tax on all excisable goods (excluding goods produced or manufactured in special economic zones) which are produced or manufactured in India as and at the rates set forth in the First Schedule to the Central Excise Tariff Act, 1985 and a special duty of excise in addition to the duty of excise specified in clause (a) on excisable goods. The term 'prescribed' means prescribed by rules. Therefore, this is a section which specifies the duty to be levied. By section 3A, there is a power conferred on the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. Thus, the two provisions deal with chargeability of the duty and the specification thereof. By section 4, valuation of excisable goods for

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purposes of charging of duty of excise is dealt with. There, one would find the definition of the term 'assessee' and it is clearly stated that where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall in a case where the goods are sold by the assessee, for delivery at the time and place of removal, the assessee and the buyer of goods are not related and the price is the sole consideration for the sale, be the transaction value. In other case, including the case where the goods are not sold, the value be determined in such manner as may be prescribed. By section 5 remission of duty on goods found deficient in quantity is dealt. Section 5A confers power to grant exemption from duty of excise. If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon.

19) The Assessing Officer merely assessees and recovers the duty on the goods and when they are removed. Therefore, the Assessing Officer and who is obliged to ensure compliance of the terms and conditions of the Notification, if the Notification is claimed in this

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case is conditional, then, it is not for him either to grant or withdraw the exemption. Therefore, there is no question of withdrawal of Exemption Notification by him on breach or violation of the conditions thereof. If he notices such breach, then, what is to be done by him is then provided by the Act and we find that the logical consequence of all this is that the goods then do not enjoy exemption but become liable to payment of duty and the duty can be recovered. That power of recovery is conferred by section 11A. In these circumstances, neither of these provisions nor their interpretation as suggested would be of any assistance to Mr. Pakale.

20) Equally, if there is any condition to furnish a Bond and in that behalf it is prescribed that in the event the terms and conditions on which the bond has been given and accepted are breached and violated, a demand can be raised, that that stipulation will not mean that the mandate of section 11A is any way diluted or can be interpreted with the aid of such term or condition of the Bond. Thus, the terms and conditions of the Exemption Notification or of the Bond cannot be of any assistance. That only would enable recovery of duty and further levy of interest, recovery thereof and equally of penalty. In these circumstances, we do not find any provision which would enable us to conclude that the date of knowledge or the date of discovery of the

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fraud by the Revenue will be the determinative and decisive date. If that is beyond the period of five years, then, section 11A will have to be interpreted accordingly is the express stand and which we find cannot be accepted because the plain language of the statute or the words of the section cannot be brushed aside or ignored. We find that the words being such and therefore we cannot accept this contention of Mr. Pakale. In submitting as above, Mr. Pakale ignores the Judgment of the Hob'ble Supreme Court in the case of *J. K. Cotton Spinning and Weaving Mills C. Ltd. vs. Collector of Central Excise* reported in **AIR 1998 SC 1270**. In paras 16 to 22 the Hon'ble Supreme Court held as under:-

> "16. Exclusion of any period from the time provided for issuing notice which is contemplated in S. 11-A of the Act is mentioned in the Explanation which is incorporated as part of that section. Period of the stay can be excluded if "the service of the notice is stayed by an order of a Court." The converse is, if there is no stay of service of notice there is no scope for excluding any time from the period of limitation as per this Explanation.
>
> 17. If a very strict interpretation is given, notice should have been issued before passing the order of stay so that service of the notice could be blocked. But such an extreme view is not necessary for understanding the contours of the Explanation.
>
> 18. In considering whether the extension of time permitted in S. 11-A of the Act can be liberally construed or that it should be a strict construction, we think it useful to recall how this Court approached the challenge made against S. 51 of the Finance Act, 1982 which afforded retrospective operation to the amended Rules 9 and 49 of the Central Excise Rules. Those provisions were assailed in the case of J. K. Spinning and Weaving Mills Ltd. (AIR 1988 SC 191) (supra) attributing arbitrariness and unreasonableness to them besides being violative of Art. 19(1)(g) of the Constitution.

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19. It was contended in that case that excessive retrospective operation prescribed by a taxing statute would amount to contravention of fundamental rights, and in support of that contention, those appellants made reliance on the decision of this Court in Rai Ramakrishna v. State of Bihar (1964) 1 SCR 897 : (AIR 1963 SC 1667) and Jawaharmal v. State of Rajasthan (1966) 1 SCR 890 : (AIR 1966 SC 764). In the former decision, this Court has pointed out that if the retrospective feature of a law is arbitrary and burdensome, the statute will not be sustained and reasonableness of the extent of retrospective operation of a statute will depend upon the circumstances of each case. The apprehension of the appellants in J. K. Spinning and Weaving Mills (AIR 1988 SC 191) (supra) that the long retrospectivity attached to the legislative amendments would result in mulcting the taxpayer with whopping financial burden has gained serious consideration of this Court and an effort was made to find a way out to salvage those provisions by minimising the gravity of the hardship on the assessees. That endeavour resulted in the judicial pronouncement in J. K. Spinning and Weaving Mills (AIR 1988 SC 191) (supra) by placing those provisions subject to the time limit fixed under S. 11-A.

20. If the said rider was not imposed by this Court as per the decision in J. K. Cotton Spinning and Weaving Co. case (AIR 1988 SC 191) (supra), what would have been the fate of Rules 9 and 49 (as amended) in the wake of the challenge to its vires cannot now be re-examined. Whatever it be, the fact remains, that Rules 9 and 49 survived the challenge when this Court nailed their sweep to the limitation specified in S 11-A. Hence that limitation period should not be stretched more than the elasticity supplied in the section itself. So, in our opinion, the eventuality envisaged in S. 11-A for the further lengthening of the limitation period must be strictly construed.

21. The notice envisaged in sub-section (1) of S. 11-A of the Act can be issued under any one of the four conditions:

- (i) when duty of excise has not been levied on the commodity;
- (ii) when such duty has been short levied; or
- (iii) When such duty, though levied, has not been paid;or
- (iv) when such duty levied was only short paid.

22. If any one of the above conditions exists, the notice contemplated therein can be issued. It is an extremely difficult proposition for acceptance that Collector of Central Excise was prevented from issuing a notice to the appellant in this case as the Delhi High Court has restrained the department from "giving

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> effect to the contents of the directive of the Board dated 24-9-1980." The said directive of the Board was mainly intended to be observed by the Collector of Central Excise as well as the other officials under him to carry out certain steps while exercising powers under Rule 9(1) of the Act and also for making delegation of such powers to the licensing authorities. Here the test is, if the said circular (or directive) had not been issued at all, could the Collector of Central Excise have issued a notice under sub-section (1) to S. 11-A of the Act. The answer is, that the Collector could still have issued a notice. If so, the suspension of the circular by the order of the Court would not have prevented the Collector from issuing the notice. The effect of the Court order dated 12-8-1981 was only to keep the circular in suspended animation so far as the appellant is concerned and nothing more."

21) Mr. Pakale's reliance on the Judgment of the Hon'ble Supreme Court of India in the case of *Fortis Hospital Ltd. vs. Commissioner of Customs, Import* reported in **2015 (318) ELT 551** cannot be of any assistance. The controversy there was whether the Institute which applied for exemption from payment of duty and took shelter of the Exemption Notification could ignore the conditions set out therein. The conditions have to be fulfilled not at the time of the import but in future by the importer as well utilising the imported equipments. Therefore, the conditions were found to be continuing in nature. It is upon such conclusion that the Hon'ble Supreme Court sustained the show cause notice and the demand. It then interpreted section 125(2) of the Customs Act, 1962. In reinforcement of this conclusion and which we have adverted to hereinabove, the Hon'ble Supreme Court concluded that the Department is taking shelter under the provisions of sub-section (2) of section 125 of the Act. However, on a plain reading

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of the said provision, it would not apply in a case where option to pay fine in lieu of confiscation is not exercised by the importer. Trigger point is the exercise of a positive option to pay the fine and redeem the confiscated goods. Only when this contingency is met, the duty becomes payable. In the present case, such an option was not exercised and the confiscated machinery was not redeemed by the Institute and thus no fine was paid. That is why the Hon'ble Supreme Court in para 16 of this decision concluded that fine has been imposed in that case. The continuing nature of the imposition was therefore an exercise and which was falling for consideration of the Hon'ble Supreme Court of India. This decision can have no application to the facts of the present case.

22) In the case of *Kalvert Foods* (supra), the Hon'ble Supreme Court of India found and on facts that the first Respondent before it was a company engaged in the manufacture of food products. On 22nd November, 2000 on receiving the information that the Respondent indulged in clandestine removals of its finished P and P food products without payment of Central Excise Duty, the Central Excise Officials searched the factory premises and after the search was carried out, the Revenue issued a show cause notice. That show cause notice was issued after the conclusion of the search on 28th November, 2000. The

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adjudicating authority confirmed the demand. The Appeal before the Customs, Excise and Gold Control Appellate Tribunal (CEGAT) was filed and the CEGAT found that the Respondent was not guilty of clandestine removal of excisable goods and also the goods were excisable inasmuch as they were not packed in the containers and therefore not required to pay Excise Duty. Thus, against such a conclusion of the CEGAT that the matter was carried to the Hon'ble Supreme Court of India. The rival contentions have been noticed and thereafter, the Hon'ble Supreme Court found that the company had admitted the fact that it was guilty of clandestine removal of excisable goods as non-excisable goods in order to evade excise duty. It voluntarily came forward to sort out the issue and to pay the excise duty and paid excise duty to the extent of Rs.11,00,000/- on different dates. It is in this context that the argument of the Revenue before the Hon'ble Supreme Court was that the issue with regard to clandestine removal of excisable goods as non-excisable goods from their premises and selling to its dealers and distributors is clearly proved from the materials on record. In the aforesaid position and since there was clandestine removal of excisable goods the period of limitation in the present case would have to be computed from the date of their knowledge, arrived at upon raids on the premises. This observation in para 27 cannot be read in isolation. That paragraph will have to be read as a whole. That paragraph read as

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a whole and with the preceding paragraphs as also the subsequent one indicate that the extended period of limitation was available when there was suppression of facts by the said company and with intent to evade the Central Excise Duty. The issue clearly therefore was whether the period of one year or the extended period of five years would apply. Given the fact situation, the extended period was applicable. These observations would not assist Mr. Pakale nor would the same enable us to hold that the Hon'ble Supreme Court held that the extended period of five years could be computed not from the relevant date as set out and defined but from the knowledge of fraud.

23) In the view that we have taken, it is not necessary to refer to the decisions relied upon by Mr. Sridharan. Suffice it to note that in the light of the clear language of the Statute the Hon'ble Supreme Court arrived at somewhat similar conclusion. In the case of *Ahmedabad Manufacturing and Calico Printing Co., Ltd.* (supra) the Hon'ble Supreme Court concluded that the mistake can be corrected but the tax can be recovered in the light of the provisions enabling such recovery and in that case, it was held that if the language of the law has clear meaning, it must be given that effect. In the case of *S. S. Gadgil* (supra), the Hon'ble Supreme Court, after underlying this difference, concluded that a provision of the nature and carved out like section 11A is really not a

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provision of limitation but a fetter or restriction on the power of the authority to bring to tax escaped income. This is what is clearly held by us. If there is a power to recover and within a specific period, then, the exercise of that power is contemplated within the said period, else there is a fetter or restriction to recover the duty. That does not mean that the Department or Revenue is remedy-less. Such a prohibition does not mean that remedies under the general laws are barred or are in any way affected or taken away. It is only when recovery is contemplated in terms of the statute that the adherence to the statutory provision is mandated. Once this conclusion is reached, then, we find that even the Judgment in the case of *Commissioner of Central Excise, Vishakhapatnam vs. Mehta and Co.* reported in **2011 (264) E. L. T. 481** will not be carrying the case any further. There, the Hon'ble Supreme Court of India found that the department discovered the fraud or it came to its knowledge in the year 1997. There was a reply sent to a letter from the Department by the Assessee in February, 1997. Limitation is computed from the date of such reply. The show cause notice was issued on 15th May, 2000, which was within the period of limitation of five years. Therefore, this is not a decision which would in any manner hold that the accrual of the cause of action is to be taken into account and for computing and calculating the relevant date.

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24) As a result of the above discussion, we find that the Tribunal's order is *ex-facie* erroneous and unsustainable in law. It is vitiated by complete non application of mind as well. That the fraud is of great magnitude and that involvement or the act is admitted does not mean that recovery of duty because of such fraud or as a result of it can be made at any time under section 11A. This was clearly lost sight of by the Tribunal. We do not find that this approach of the Tribunal can be sustained in law. The Appeals therefore succeed. The impugned orders are quashed and set aside. There would be no order as to costs.

(G.S.KULKARNI, J.) **(S.C.DHARMADHIKARI, J.)**

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