IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 23-12-2008

CORAM

THE HONOURABLE MR.JUSTICE M.JAICHANDREN

Writ Petition No.3081 of 2001

M/s.Bakelite Hylam Ltd.,
7-2-1669, Sanathnagar,
Hyderabad-500 018,
Rep. by Manager-Taxation. .. Petitioner.

Versus

1.The Customs, Excise and Gold (Control)
Appellate Tribunal, Chennai.

2.The Commissioner of Central Excise,
Hyderabad. .. Respondents.

Prayer: This petition has been filed seeking for a writ of Certiorari, calling for the records of the first respondent culminating in its Final Order No.485/2000, dated 18.4.2000, and quash the same.

For Petitioners : Mr.R.Sashidaran

For Respondents : Mr.S.M.Deenadayalan (C.G.S.C.) (R2)

O R D E R

Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the second respondent.

2. It is stated that the petitioner is a public Limited Company incorporated under the Companies Act, 1956, having its registered office and manufacturing Unit at Sanathnagar, Hyderabad. The petitioner is engaged, inter alia, in the manufacture of Alkyd Resins and various other products. It has been further stated that Section 3 of the Central Excise Act, 1944, is the charging Section in terms of which duties specified, under the Schedule to the Central Excise Tariff Act, 1985, is levied on various excisable goods manufactured in India at the rates set forth in the Schedule to the Central Excise Tariff Act, 1985. The Central Excise Rules, 1944, prescribe a detailed procedure to be followed by the assessee.

According to Rule 173B, as it stood before its amendment, on 16.3.95, all assessees were required to file, with the Proper Officer, a Classification List giving the full description of the excisable goods produced or manufactured or to be produced or manufactured by them, the chapter heading and the sub-heading of the Tariff Act under which such goods would fall, the rate of duty leviable on them and all other particulars as may be required by the Collector. Under Rule 173B(2) the Proper Officer, after such enquiry as he deems fit, approve the list with such modifications as are considered necessary. The assessee is required to determine the duty payable on the goods intended to be removed in terms of such approved classification list. Rule 173B had been amended, on 16.3.95. After the amendment, the assessee was required to file a declaration giving all the details, as previously required under the said Rule. However, after the said amendment, the prior approval of the classification list had been done away with.

3. Under Section 11A of the Central Excise Act, 1944, it has been stated that where any duty of excise has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, a Central Excise Officer may, within six months 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 as to why he should not pay the amount specified in the notice. The proviso to Section 11A provides 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 therein, with intent to evade payment of duty, by such person or his agent, a demand could be made, within a period of five years from the relevant date, by the concerned authority. The classification of the goods has to be determined in terms of the Central Excise Tariff Act, 1985, which provides the rate of duty applicable to the excisable goods. As such, the petitioner had filed the Classification Lists, classifying the various goods manufactured by the petitioner company and the said Classification Lists were approved from time to time. With the amendment of Rule 173B, the petitioner has been filing declarations, as required thereunder. The petitioner had filed a Classification List in the year, 1988, claiming classification of Alkyd Resins under Chapter sub-heading 3907.50 of the Central Excise Tariff Act, 1985. The said classification was approved by the Assistant Commissioner, after due verification. Subsequently, the Classification List was again approved in the year, 1989. The petitioner has been clearing the goods in terms of the Approved Classification Lists and it has been paying the duty. Accordingly, all the necessary details were being provided by the petitioner Company as and when they were required by

the authorities concerned. Further, the composition of the goods had been within the knowledge of the department, through Modvat declarations for the various inputs used in the manufacture of the final product.

4. It has been further stated that the petitioner had adopted the above classification, based on Note 3 to Chapter 32 in terms of which a solution consisting of any of the products specified under heading 39.01 to 39.13 in Volatile Organic Solvent, when the weight of the solvent exceeds 50% of the weight of the solution, should be classified under Chapter-32. Since the goods in question did not satisfy the said condition the petitioner classified them under the heading 3907.50 and such a classification had been duly approved by the Assistant Collector of Central Excise for the years 1988 and 1989. However, in the year 1993, the Department, after a detailed technical investigation, had taken the stand that the subject goods were classifiable under heading 3208.40. In such circumstances, the petitioner, in order to establish its bonafides, based on the request of the department, had paid the differential duty, suo motu, to the tune of Rs.17,41,328.65, on 4.9.93, `under protest', towards clearances made between June, 1988 to February, 1993. While so, a show cause notice bearing O.R.No.63/93-Adjn., dated 24.11.93, had been issued calling upon the petitioner to show cause as to why the duty of Rs.17,41,328.65, being allegedly duty short-paid on insulating varnish, cleared between 1.6.88 to 28.2.93, should not be confirmed, under Rule 9(2) read with Section 11A of the Central Excise Act, 1944 and as to why a penalty should not be imposed on the petitioner, under Rules 9(2), 173Q and 226 of the Central Excise Rules, 1944. On receipt of the said show cause notice, the petitioner had filed a detailed reply, vide letter, dated 15.3.94, and had also appeared for a personal hearing, submitting among other things, that the department had not made out a case for invoking the extended period of limitation and hence, the demand was time barred. However, the second respondent had passed an order being the Order-in-Original No.C.Ex.84/97, bearing O.R.No.63/93 Adjn., dated 6.11.97, received by the petitioner, on 27.11.97, confirming the demand in the show cause notice, on untenable grounds and imposing a penalty, under Rules 9(2), 173Q and 226 of the Central Excise Rules, 1944, to the tune of Rs.10 lakhs, on the petitioner.

5. It has also been stated that Section 35-B of the Central Excise and Salt Act provides for an appeal against the orders of the second respondent before the first respondent Tribunal. Accordingly, the petitioner had preferred an appeal before the first respondent Tribunal, which had heard the appeal on various dates, effectively, from 25.1.99 to 31.3.2000. Thereafter, the appeal was reserved for orders. At the time of the commencement of the arguments during the early part of the year 1999, the petitioner had filed a brief note containing the list of citations and judgments. Thereafter, a Full

Bench of the Supreme Court had delivered a judgment in the case of Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633). In the said case the Supreme Court had held that the differential duty cannot be recovered on the ground of short levy when the duty has been paid in terms of the Approved Classification List and reclassification of goods and the consequent demand can only be effective, prospectively, from the date of issue of the show cause notice. Therefore, after the said judgment had been reported in the month of November, 1999, one of the main grounds taken on behalf of the petitioner company was that the Classification List claiming classification under the heading 3907.50, was approved by the department, from 31.3.88 onwards and since the goods had been cleared only in terms of an Approved Classification List, there cannot be a short-levy, as held by the Supreme Court in Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633) and therefore, the demand was unsustainable.

6. However, it was pointed, at the time of the arguments before the Tribunal, that the judgment of the Supreme Court held the field as on that date. It was further contended that irrespective of the merits of the case, with regard to the dispute in classification, there was no question of short-levy and the consequential demand of the duty and the penalty was not sustainable. However, the amendments introduced by the Finance Bill, 2000, made substantial changes in Section 11A of the Central Excise Act, 1944, practically, undoing the judgment of Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633). Even according to the Finance Bill, 2000, there can be no question of levying penalty since it had been categorically clarified, by way of an explanation in the amendments sought to be brought about by the Finance Bill. After arguments had been closed, on 31.3.2000, the first respondent Tribunal had reserved orders. Thereafter, the petitioner had received a Final Order No.485/2000, dated 18.4.2000, on 12.5.2000. The first respondent Tribunal had dismissed the appeal, as it had upheld the order of the second respondent, while restricting the demand to five years. The order of the first respondent Tribunal did not record the arguments made on behalf of the petitioner, especially, with reference to the decision of the Supreme Court in Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633). The order of the first respondent Tribunal, had not taken into account various other submissions made on behalf of the petitioner Company. Thus, there was an error apparent on the face of the record, in the order of the first respondent Tribunal, dated 18.4.2000. Therefore, the petitioner had moved the first respondent Tribunal seeking rectification of the mistake in the final order by filing a Miscellaneous Application. However, the first respondent Tribunal had dismissed the Miscellaneous Application by its Miscellaneous Order No.535/2000, dated 28.11.2000, on the ground that the order had been passed based on the written submissions which do not

contain any reference to the Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633) and that the grounds urged before the first respondent Tribunal for rectification of a mistake, which were in fact fresh grounds, had not been raised at the time of the passing of the final order, dated 18.4.2000. Since the order of the first respondent had been passed contrary to the judgment of the Supreme Court in the Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633) and the other relevant decisions of the Supreme Court, it is per incuriam and hence, it is without jurisdiction and without the authority of law. In such circumstances, the petitioner Company had preferred the present writ petition before this court, under Article 226 of the Constitution of India.

7. In the counter affidavit filed on behalf of the second respondent, it has been stated that the writ petition is liable to be dismissed as it has been filed before this Court without any cause of action taking place within its jurisdiction. Apart from raising the preliminary objection, with regard to the jurisdiction of this Court, it has also been stated that the petitioner is manufacturing various types of excisable goods such as decorative laminates, industrial laminates, resins etc., after filing classification lists/declarations with the Central Excise Department. In the classification list, the petitioner company had classified the impugned goods, namely, Alkyd Resins under Chapter Sub-heading No.3907.50, which was approved by the Assistant Collector. However, on certain information received through the intelligence to the effect that the petitioner company was clearing certain grades of insulating varnishes, classifiable under Sub-heading No.3208.40 of the Central Excise Tariff Act, 1985, in the guise of Alkyd Resins, classifiable under 3907.50 of the Central Excise Tariff Act, 1985, a detailed investigation had been taken up, along with the study of the Classification List filed by the petitioner Company, with reference to the actual manufacturing processing and the versatility of the products. All grades were manufactured by blending phenolic resins, or melamine resins or both with Alkyd Resins in varying proportions along with solvents and stabilizers. These grades are marketed for the purpose of using them as insulation varnishes as is clear from the technical data sheets and the admissions made by Basha, Assistant Manager (R&D), of the petitioner Company. Blending of Phenolic Resins or melamine resins, along with Alkyd Resins is made to get the desired characteristic suitable for electrical or mechanical application such as the desired film thickness and electrical insulation. Various grades of the impugned goods, namely, i.e. varnishes are marketed for the purpose of using them as insulating varnishes, a fact which emerges after going through the technical data sheets and the admissions made by R&D officials of the petitioner.

8. It has also been stated that the said facts were never brought to the notice of the department at any stage. Even in the letter, dated 16.11.92, the petitioner had mentioned that Polyester based on alkyds are only modified by drying oil fatty acids. They did not disclose that the final product is the blend of alkyd resins. The relevant extract of Note to Chapter 34 states as follows:

> "Heading No.32.08 includes solutions (other than collection) consisting of any of the products specified in heading Nos.s39.13 in volatile organic solvents when the weight of the solvent exceeds 50 percent of the weight of the solution."

Thus, it is evident that it is an inclusive note and it does not exclude other varnishes containing less than 50% of the solvent by weight. Since all these grades of resins are essentially used as insulating varnishes, as is evident from the technical data sheets and statements, for imparting electrical insulating properties, and mechanical strength such as surface production, they should have been classified as insulating varnishes, under 3208.40 of the Central Excise Tariff Act, 1985. However, the assessee had neither declared the correct classification of the product nor made the complete data available to the department to classify the product correctly. But for the extensive investigation undertaken by the officers the said facts could never have come to light. The non submission of the relevant information and the wrong description given to the product by the assessee had led the Department to classify the product under 3907.50 of the Act. It is also clear that even though the petitioner Company had conscious knowledge of the correct classification of the product, it had chosen to clear the goods as Alkyd Resins, with an intent to evade payment of appropriate duty of excise, by wilfully suppressing the vital facts. During the period June, 1988, to February, 1993, the petitioner company had manufactured and cleared a quantity of 3,06,368.11 litres of aforesaid grades as alkyd resins, instead of clearing them as insulating varnishes. The misclassification had resulted in short payment of Rs.16,20,604.85/- BED and Rs.1,20,723.80 SED, which is liable to be demanded under the proviso to Section 11A of the Central Excise and Salt Act, 1944, which envisages payment of duty short-paid for an extended period of five years.

9. It has also been stated that when the investigation was in progress, the assessee had reclassified the product under 3208.40 and the petitioner company had started paying the duty at the rate applicable to the heading 3208.40. The petitioner company, vide letter, dated 4.9.93, had intimated the department that the differential duty of Rs.17,41,428.65/- payable on the clearance made by them during June, 1988 to February, 1993, pertaining to this

had been paid. It has been stated that certain informations which were vital in deciding the classification of the product were not provided by the assessee. When the Department had come to know about the suppression of certain information a detailed investigation was undertaken by the Central Excise Department. After gathering the information through its intelligence that the assessee is clearing grades of insulating varnishes, classifiable under Sub-heading No.3208.40 of the Central Excise Tariff Act, 1985, in the guise of Alkyd Resins, classifiable under 3907.50 of the Central Excise Tariff Act, 1985, a detailed investigation was taken up and after registering a case, a show cause notice had been issued to the assessee, in accordance with law. Since the assessee had willfully suppressed the vital information, with an intention to evade the payment of duty, the department had to proceed against the petitioner company, under the proviso to Section 11A of the Central Excise Tariff Act, 1944. Therefore, the contention of the assessee that the demand is time barred cannot be sustained.

10. It has been further stated that the order of the first respondent Tribunal had been passed based on the written submissions of the assessee which did not contain any reference to Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633). The grounds urged before the first respondent Tribunal are therefore, grounds which were not raised at the time of the passing of the final order, dated 18.4.2000. As such, the contentions raised by the assessee, are not acceptable in law. All the submissions of the assessee had been taken into account while the final order had been passed by the first respondent Tribunal. The Classification Lists were proved only on the basis of the information furnished by the assessee. However, on investigation, the information furnished by the assessee were proved to be incorrect. The petitioner had not disclosed the fact that the final product is a blend of Alkyd Resins with other resins. Since the demand had been raised in the show cause notice, invoking the proviso to Section 11A of the Central Excise Act, 1944, the approval or otherwise of the Classification Lists has no significance. The assessee had never cited the Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633). Further, the other decisions of the Supreme Court, relied on by the petitioner company, are not applicable to the facts and circumstances of the present case. It is relevant to note that the petitioner company had voluntarily effected payment of duty for the period from June, 1988 to February, 1993, even while they were disputing the classification of the goods and their liability to pay the duty. Therefore, the duty demanded by the department, from the petitioner company had been upheld by the Commissioner, Central Excise, Hyderabad and also by the first respondent Tribunal. Thus, it is clear that the claims made by the petitioner company are without substance and devoid of merits.

11. The learned counsel appearing for the petitioner had submitted that the impugned order of the first respondent, dated 18.4.2000, is without jurisdiction and without the authority of law, being contrary to the decision of the Supreme Court, including the Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633). The impugned order had been passed by the first respondent Tribunal without taking into account the submissions made at the time of the hearing of the appeal. The order of the first respondent Tribunal is also contrary to the Central Excise Act, 1944, and the Rules made thereunder. The said order is contrary to the principles enshrined under Articles 14 and 19 of the Constitution of India. The first respondent Tribunal had not taken into consideration the principle laid down in Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633) even though it held the field when the matter was pending on the file of the first respondent Tribunal, as well as on the date of the passing of the final order. According to the said decision of the Supreme Court, when clearance had been made in terms of an approved classification or a price list there can be no short-levy. In its final order, dated 18.4.2000, the first respondent Tribunal has specifically given a finding that the classification lists filed during the period June, 1988 to February, 1993, were approved. When it was found that the classification lists for the disputed period had been approved, the decision of the Supreme Court in Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633) ought to have been applied. The miscellaneous application filed by the petitioner had been dismissed by the first respondent Tribunal, by its miscellaneous order, dated 28.11.2000, stating that the decision of the Supreme Court in Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633) had not been relied upon by the petitioner at the first instance.

12. The first respondent Tribunal had failed to note that in the written submissions filed on behalf of the petitioner, a specific issue had been raised, as decided in the Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633), that there can be no demand for differential duty when the classification lists had been approved. The first respondent Tribunal had overlooked this vital aspect, while passing the final order, dated 18.4.2000, in the appeal filed by the petitioner, in Appeal No.E/441/98. Thus, the order of the first respondent Tribunal is contrary to the decision of the Supreme Court in Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633) and therefore, it is per incuriam.

13. The learned counsel for the petitioner had also submitted that when the matter had been taken up by the first respondent Tribunal for final hearing, on 31.3.2000, the Finance Bill 2000, had already been introduced for being passed as a law. In terms of Clause 106 of the Finance Bill, 2000, all actions taken under

Section 11A of the Central Excise Act, 1944, were validated. When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a show cause notice could be issued, within six months, from the relevant date. However, the proviso to Section 11A of the Act would be applicable only where any duty of excise has not been levied or paid or were short-levied or short paid or erroneously refunded by reason of order or collection or any willful mis-statement or the suppression of facts or contravention of any of the provisions of the Act, or rules made thereunder, with intent to avoid payment of duty. In such circumstances of the case, a demand can be made for such payment, within a period of five years from the relevant date. Since there is nothing to show on the part of the department that the petitioner company had evaded payment of excise duty by fraud, collusion or willful mis-statement or suppression of facts, the extended period of five years from the relevant date would not be applicable to the present case. After the amendment of Rule 173-B of the Central Excise Rules, 1944, the petitioner has been filing declaration as required thereunder. The petitioner had filed a classification list in the year, 1988, claiming classification of Alkyd Resins under the changed Sub-heading 3907.50 of the Central Excise Tariff Act, 1985. The said classification was approved by the Assistant Commissioner after due verification. While so, it is not open to the department to invoke the proviso to Section 11A of the Central Excise and Salt Act, 1944. According to Clause 110 of the Finance Act, 2000, which came into effect on 12.3.2000, any notice issued or served on any person, under proviso to Section 11A of the Central Excise Act, 1944, during the period commencing on and from 17.11.1980 and ending on the date on which the Finance Act 2000, received the assent of the President, demanding duty on account of non-payment, short-payment, non-levy, short-levy, or tax refund, within a period of six months or five years as the case may be from the relevant date, as defined in Clause (ii) of Sub Section (3) of that Section shall be deemed to be and to always have been for all purposes, validly and effectively issued or served under that Section, notwithstanding any approval, acceptance, or assessment, relating the rate of duty on or value of the excisable goods, by any Central Excise officer, under any other provision of the Central Excise Act or the rules made thereunder. Further, the following explanation had been inserted in the Validation Act. The explanation reads as follows:

> "Explanation- for the removal of doubts it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this Section had not come into force".

14. Therefore, in terms of the Validation Act, the department was entitled to demand duty even in case of approved classification list or price list. However, the department has been barred from

levying any penalty in cases where classification or price list had been approved. It is to be noted that when the first respondent Tribunal had passed the impugned order, the Finance Act, 2000, had not come into force. Even assuming that the Department had the right to refer to the duty once the Act came into force, the question of levy of penalty on the petitioner would not arise. Thus, the impugned order of the first respondent is clearly without the authority of law as it is in contravention of the specific provisions of the Act.

15. It has been stated that the extended period of limitation under the proviso to Section 11A of the Central Excise and Salt Act, 1944, cannot be invoked when clearance have been made with the knowledge of the Department, under an approved classification, as decided by the Supreme Court in its various decisions relating to the matter. Further, no differential duty can be demanded until the correctness of the approval of the price list has been questioned by issuing a show cause notice. The first respondent Tribunal had clearly mislead itself in coming to the conclusion that there was no necessity for a show cause notice to be issued to the petitioner Company, with regard to the reclassification of the goods in question, since the petitioner had opted to file a classification list, after investigation had commenced in the year, 1993, classifying Alkyd Resins under chapter sub-heading 3208.40 and as it had voluntarily paid the duty for the Period June, 1988 to February, 1993, though 'under protest'. The first respondent Tribunal has failed to appreciate that by mere payment of duty for clearance, under the approved classification list or the filing of a revised classification list, with effect from March, 1993, would not change the approved nature of the classification list for the period June, 1988 to February, 1993. The approved classification list cannot be re-opened without issuing a show cause notice, as held by the Supreme Court in Madhumilan Syntex case.

16. The learned counsel had further submitted that the question of short levy would not arise when clearances had been made under approved classification lists. Hence, the finding of the first respondent Tribunal that the classification was changed at the initiation of the petitioner and hence, no show cause notice, proposing a change of classification, was required to be issued, is clearly contrary to law. Further, the first respondent was holding that Alkyd Resins manufactured by the petitioner was classifiable under heading 3208.40 is contrary to law. The very demand made against the petitioner is contrary to the decisions of the Supreme Court and the levy of penalty, is also illegal.

17. The learned counsel for the petitioner had submitted that the Finance Bill, 2000, which made substantial changes in Section 11A of the Central Excise Act, 1944, due to the Supreme Court

Judgment, was introduced in the Lok Sabha, on 29.2.2000, but had not been passed as an Act,either at the time of the arguments before the first respondent Tribunal or at the time of the passing of the final order, on 18.4.2000. Therefore, the judgment of the Supreme Court, in Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633), held the field on the date of the said order. According to the judgment of the Supreme Court, in Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633), when the clearances are in terms of approved classification or price list there can be no short levy. Even if it could be said that Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633) had been retrospectively invalidated in terms of the explanations to Clauses 105 and 106 of the Finance Bill, no act or omission on the part of any person shall be punishable as an offence, which would not have been so punishable if the Section had not come into force. Under Clause 106 all actions taken under Section 11A, even in case of any approval or acceptance of assessments, were validated. While the clauses gave retrospective effect to actions already taken under Section 11A, by way of an explanation it was clarified that no penalty could be imposed due to the retrospective amendment. In spite of all such issues having been raised, the first respondent Tribunal had held that, except for the duty demand confirmed for the period exceeding five years from the date of issue of show cause notice, there was no other infirmity in the Order-in-Original, dated 6.11.97. Therefore, the final order of the first respondent Tribunal, dated 18.4.2000, made in Appeal No.E/441/98, is arbitrary, contrary to law and liable to be set aside.

18. The learned counsel for the petitioner had further submitted that the issue of classification of the product by the respondents is not being pressed. However, it has been stated that the show cause notice issued by the respondents, with regard to the imposition of penalty on the petitioner, is contrary to law and the principles of natural justice. The first respondent Tribunal had misled itself in rejecting the contentions raised on behalf of the petitioner that the levy of penalty on the petitioner, by the respondents, is illegal since the duty had been paid even prior to the issue of show cause notice. The learned counsel for the petitioner had further stated that the first respondent Tribunal had not considered the substantial changes made in the Finance Bill, 2000, in Section 11 of the Act. Even though the Bill had not become an Act, either at the time of the making of the arguments before the Tribunal or at the time of the passing of the order, on 19.4.2000, the judgment of the Supreme Court, in Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633), was holding the field on the date of the order. In terms of the said judgment, when the clearances are made in terms of approved classification or price lists, there can be no short-levy. Even assuming, without admitting, that the judgment of the Supreme Court, in Collector of Central

Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633), had been retrospectively invalidated in terms of the explanations to Clauses 105 and 106 of the Finance Bill, 2000, no act or omission on the part of any person shall be punishable as an offence, which would not have been so punishable if the Section had not come into force. The said clauses had sought to amend Section 11A of the Act and under Clause 106, all actions taken under Section 11A, even in case of any approval or acceptance of assessments, were validated. While the clauses gave retrospective effect to actions already taken under Section 11A, by way of explanation it was categorically clarified that no penalty could be imposed due to the retrospective amendment. In spite of the fact that the above contentions had been raised before the first respondent Tribunal it did not consider the same, while passing its order confirming the penalty levied on the petitioner. Therefore, the petitioner had filed a Miscellaneous application before the first respondent Tribunal and by an order, dated 28.11.2000, the Tribunal had rejected the same by stating that the petitioner had not shown sufficient grounds to recall the final order passed earlier and to pass fresh orders based on the grounds raised by the petitioner. With regard to the contention of the second respondent that the writ petition is not maintainable before this Court, the learned counsel for the petitioner had submitted that the said contention is not sustainable since the impugned order had been passed by the first respondent Tribunal at Chennai and therefore, this Court has the territorial jurisdiction in respect of the present writ petition filed by the petitioner.

19. Per contra, the learned counsel appearing on behalf of the second respondent had submitted that the petitioner had not disclosed certain vital facts to the Customs and the Central Excise Department. In the letter, dated 16.11.92, the petitioner had mentioned that Polyester based on alkyds are only modified by drying oil fatty acids. It did not disclose that the final product is a blend of alkyd resins with other resins. However, it was evident that the final product manufactured by the petitioner was essentially used as insulating varnish for imparting electrical insulating properties and mechanical strength, such as surface production and therefore, the final product ought to have been classified as insulating varnish, under the sub heading 3208.40 of the Central Excise Tariff, Act, 1985. Instead the petitioner had classified the final product as Alkyd Resin, classifiable under 3907.50 of the Act. In such circumstances, a detailed investigation had been taken up by the Central Excise Department and after registering a case, a show cause notice had been issued to the assessee, in accordance with law. Since the assessee had willfully suppressed certain vital information, with an intention to evade payment of duty, the proviso to Section 11A had to be invoked by the Departmental authorities. Therefore, the question of the demand being time barred does not arise. The asseeee had neither declared

the correct classification of the product nor made the complete data available to the Department to classify the product correctly. The non submission of the relevant information and the wrong description given to the product by the assessee had led the department to classify the product under 3907.50. However, when the investigation was in progress the assessee had classified the product under 3208.40 and started paying the duty at the rate applicable to the heading 3208.40 of the Central Excise Tariff Act, 1995. Since the wrong classification of the product by the assessee had resulted in short-payment, which is liable to be demanded, under the proviso to Section 11A of the Central Excise and Salt Act, 1944, which envisages payment of duty short-paid for an extended period of five years, the show cause notice, dated 24.11.93, issued to the petitioner, relating to the duty demand and the penalty under the Central Excise Act and the Rules framed thereunder, for the period 1.6.88 to 28.2.93, is valid, as it has been issued in accordance with law.

20. It was further stated that the first respondent Tribunal had passed the final order, dated 18.4.2000, taking into account all the relevant aspects, based on the written submissions of the assessee. Since the grounds urged before the first respondent Tribunal in the subsequent application filed by the assessee were fresh grounds, which had not been raised at the time of the passing of the final order, dated 18.4.2000, the application filed by the assessee had been rejected by the first respondent Tribunal, by its order, dated 28.11.2000. In such circumstances, the writ petition is liable to be dismissed.

21. With regard to the jurisdiction of this Court to entertain the writ petition the learned counsel for the petitioner had relied on the following decisions in support of his contentions.

1) In Kusum Ingots and Alloys Limited Vs. Union of India [2004 (168) E.L.T. 3 (S.C.)], the Supreme Court in Paragraph-27 has held as follows:

> "When an order, however, is passed by a Court or Tribunal or an executive authority whether under provisions of a statute or otherwise, a part of cause of action arises at that place. Even in a given case, when the original authority is constituted at one place and the appellate authority is constituted at another, a writ petition would be maintainable at both the places. In other words, as order of the appellate authority constitutes a part of cause of action, a writ petition would be maintainable in the High Court within whose jurisdiction it is situate having regard to the fact that the order of the appellate authority is also required to be set aside and as the order of the original authority merges with that of the appellate authority."

2) A Division Bench of this Court in ORJ Electronics Oxides Limited Vs. CESTAT, Chennai, (2008(225) E.L.T. 202 Mad.) at paragraphs 11 and 12 has held as follows:

> "11. A Full Bench of this Court in Sanjos Jewellers V. Syndicate Bank 2007(5) CTC 305, has held that a writ petition challenging the order of the Debts Recovery Appellate Tribunal which is situated within the territorial limits of this Court, while the original Court is situated in another State, is maintainable. Similar is the view taken by a Division Bench of the Bombay High Court, to which one of us (A.P.Shah, C.J.) was a party in Kishore Rungta V. Punjab National Bank (2003(151(E.L.T.502 (Bom.)]. In that case, it was held that the order of the Debts Recovery Tribunal in Jaipur merged in the order of the Debts Recovery Appellate Tribunal at Mumbai. The Courts in Jaipur would have no jurisdiction to entertain the writ petition which challenged the order of the Debts Recovery Appellate Tribunal, Mumbai. Even otherwise, the writ petition was maintainable in the Bombay High Court within whose jurisdiction the appellate authority is based. Part of the cause of action having arisen in Mumbai, the Bombay High Court had the jurisdiction to entertain the writ petition in view of Article 226(2) of the Constitution.
>
> 12. In the light of decided cases, it is clear that the territorial jurisdiction of the Court and the `cause of action' are interlined. To decide the question of territorial jurisdiction, it is necessary to finding out the place where the `cause of action' arose. It is not disputed that in the present case, the order impugned was issued by the Tribunal at Chennai. The appellant is aggrieved by the order, which has been passed in Chennai. The grievance of the appellant arose at Chennai, and as such Principal Bench has the jurisdiction to deal with the matter."

22. The learned counsel for the petitioner had also relied on the following decisions of the Supreme Court in support of his contentions:

22.1. In Union of India and others Vs. Madhumilan Syntex Pvt. Ltd [1988 (35) E.L.T. 349 (S.C.)], it has been held as follows:

> "Section 11A of the Central Excises and Salt Act, 1944, clearly proceeds that prior show cause Notice must be issued to the person against whom any demand on ground of short-levy or non-levy of payment of excise duty is proposed to be made. Therefore a post facto Show Cause Notice cannot be regarded as adequate in law." (Para 4)

"If the approved Classification List has been modified by the Assistant Collector without any opportunity and the Show Cause Notice is given only with regard to quantification of the amount of the short-levy, such a Show Cause Notice cannot be regarded as for modification of Classification List hence it is not covered under Section 11A of the Central Excises and Salt Act, 1944, and the period of six month is also not available. However, such a Show Cause Notice can be regarded proper for the period subsequent to its issue." (Para 6)

22.2. In ITW Signode India Ltd., Vs. Collector of Central Excise [2003(158) E.L.T. 403 (S.C.)] it has been held as follows:

"Section 11 A deals with a case when inter alia excise duty has been levied or has been, short-levied or short-paid. The word "such" occurring after the words "whether or not" refers to non-levy, non-payment, short-levy or short-payment or erroneous refund. It is, therefore, no correct to contend that the word "such" indicates only such short-levy which has been held to be non-existent in Cotspun having regard to Rule 173B. Such short-levy or non-levy may be on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods. Thus, any approval made in terms of Rule 10, in the event, any mistake therein is detected, would also come within he purview of the expression "such short-levy or short-payment". Such notice is to be served on the person chargeable with duty which inter alia has been short-levy or short-paid." (Para 49)

"A statute may be enacted prospectively or retrospectively. A retrospective effect indisputably can be given in the case of curative and validating statute. In fact, curative statutes by their very nature are intended to operate upon and affect past transactions having regard to the fact that they operate on conditions already existing. However, the scope of the Validating Act may vary from case to case. (Para 55)

22.3. In Commissioner of Central Excise, Madras Vs. T.K.K.Pharma Ltd. (2006 (198) E.L.T. 481 (S.C.), it has been held as follows:

"Order of Assistant Collector approving classification list not a mere cursory reasoning but a detailed investigation into facts and conclusion reached on basis of those facts – Assistant Collector may be wrong in approving classification of product, but it cannot be

said that he did not consider relevant material or that there was any suppression of fact."

22.4. In Continental Foundation Jt.Venture Vs. Commr. Of C.Ex., Chandigarh-I [2007(216) E.L.T. 177(S.C.)], it has been held in Paragraphs-10, 11 and 12 as follows:

"10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as `fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.

11. Factual position goes to show the Revenue relied on the circular, dated 23.5.97 and dated 19.12.97. The circular dated 6.1.98, is the one on which appellant places reliance. Undisputedly, CEGAT in Continental Foundation joint Venture case (supra) was held to be not correct in a subsequent larger Bench judgment. It is, therefore, clear that there was scope for entertaining duobt about the view to be taken. The Tribunal apparently has not considered these aspects correctly. Contrary to the factual position, the CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly taken. The factual scenario clearly goes to show that there was scope for entertaining doubt, and taking a particular stand which rules out application of Section 11A of the Act.

12. As far as fraud and collusion are concerned, it is evident that the 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. Thenext set of words `contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words `with intent to evade payment of duty.' Therefore, there cannot be suppression or mis-statement of fact, which is not wilful and yet

constitute a permissible ground for the purpose of the proviso to Section 11A. Mis-statement of fact must be wilful."

23. With regard to the period of limitation and the imposition of penalty the learned counsel for the petitioner had relied on the following decisions:

23.1. In Collector of Central Excise Vs. H.M.M.Limited [1995 (76) E.L.T. 497(S.C.)], wherein it has been held as follows:

"2. The assessee contended before the Additional Collector of Central Excise that the show cause notice was time barred under the main part of Section 11A since it was issued after the expiry of the period of six months stipulated therein but the Additional Collector sustained he notice on the ground that it was within five years impliedly holding that the purported action was under the proviso to Section 11A of the Act. There is no dispute that the show cause notice cannot be sustained under sub-section (1) of Section 11A unless the proviso is attracted. Admittedly, it is beyond the period of limitation of six months prescribed under Section 11A(1) but it is within the extended period of 5 years under the proviso to that sub-section. Now in order to attract the proviso it must be shown that the excise duty escaped payment by reason of fraud, collusion or wilful mis-statement or suppression of fact or contravention of any provision of the Act of of the Rules thereunder with intent to evade payment of duty. In that case the period of six months would stand extended to5 years as provided by the said proviso. Therefore, in order to attract the proviso to Section 11A (1) it must be alleged in the show cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or wilful mis-statement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been noticed or that the assessee was guilty of wilful mis-statement or suppression of fact. In the absence of such averments in the show cause notice it is difficult to understand how the Additional Collector while conceding that the notice had been issued after the period of six months prescribed in Section 11A(1) of the Act had proceeded to observe that there was wilful action of withholding of vital information apparently for evasion of excise duty due on this waste/by-product but counsel for

the assessee contended that in the absence of any such allegation in the show cause notice the assessee was not put to notice regarding specific allegation under the proviso to that sub-section. The mere non-declaration of the waste-by-product in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of excise duty due on the said product. There could be, counsel contended, bonafide belief on the part of the assessee that the said waste or by-product did not attract excise duty and hence, it may not have been included in their classification list. But that per se cannot go to prove that there was the intention to evade payment of duty or that the assessee was guilty of fraud, collusion, mis-conduct or suppression to attract the proviso to Section 11A(1) of the Act. There is considerable force in this contention. If the Department proposes to invoke the proviso to Section 11A (1), the show cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the excise department places reliance on the proviso it must be specifically stated in the show cause notice which is the allegation against the assessee falling within the four corners of the said proviso. In the instant case that having not been specifically stated the Additional Collector was not justified in interfering (merely because the assessee had failed to make a declaration in regard to waste or by-product) an intention to evade the payment of duty. The Additional Collector did not specifically deal with this contention of the assessee but merely drew the inference that since the classification list did not make any mention in regard to this waste product it could be inferred that the assessee had apparently tried to evade the payment of excise duty.

3. For the above reason, we see no merit in this appeal and dismiss the same with no order as to costs."

23.2. In Additional Collector of C.Ex., Bombay-II Vs. Mahindra & Mahindra Ltd., (2000 (120) E.L.T. 290 (S.C.), it has been held as follows:

"Extended period of five years invoked by Department despite goods having been cleared on the basis of approved Price List- As per S.C. Decision in Cotspun's case [1999 (113) E.L.T. 353 (S.C.)], differential duty not demandable until correctness of such approval is questioned by issue

of Show Cause Notice hence duty demandable only from the date of Show Cause Notice."

23.3. In Rashtriya Ispat Nigam Ltd., Vs. Commissioner of C.Ex., Visakhapatnam [2003 (161) E.L.T.285 (Tri.-Bang.)], it has been held as follows:

"Duty deposited before issue of show cause notice - Penalty not impossible under Section 11AC of Central Excise Act, 1944, as well as under Rule 173 Q of erstwhile Central Excise Rules, 1944."

24. In Pahwa Chemicals Private Limited VS Commissioner of C.Ex., Delhi [2005 (189) E.L.T. 257 (S.C.)], it has been held in paras 3, 4 and 5 as follows:

"Demand- Limitation -Extended period-Mere failure to declare does not amount to misdeclaration or willful suppression - Some positive act on part of party to establish either willful misdeclaration or willful suppression is must - When all facts are within knowledge of Department and a party in the belief that affixing of a label makes no difference does not make a declaration, then there would be no willful misdeclaration or willful suppression - Section 11A(1) of Central Excise Act, 1944"

25. In Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633), it has been held that the levy of excise duty on the basis of an approved classification list is the correct levy, at least until the correctness of the approval is questioned by the issuance of a show-cause notice to the assessee. It is only when the correctness of the approval is challenged that an approved classification list ceases to be such. The levy of excise duty on the basis of an approved classification list is not a short-levy. Differential duty cannot be recovered on the ground that it is a short-levy. Rule 10 has then no application. So the Tribunal was right in holding that the revised assessment could be made effective only prospectively from the date of the show-cause notices and not with reference to earlier removals made under approved classification lists.

26. The learned counsel appearing for the second respondent had relied on the following decision reported in Collector of Central Excise, Baroda Vs. L.M.P.Precision Eng. Co. Ltd ([2004 (163 E.L.T. 290 (S.C.)], wherein it has been held as follows:

"18. The next issue is whether the extended period of limitation could be invoked by the appellant for the purpose of raising the impugned demand against the respondent. Rule 173B of the Rules requires inter alia that every assessee shall file with the proper officer for

approval a list in such form as the Collector may direct showing the "full description" of the goods manufactured. The form in which the application is required to be submitted has been prescribed as the C.L.I. Form. The Form requires "a full description of each item of the goods produced, manufactured with warehouse together with the description as would appear from the invoice". Admittedly, the description of the goods given in the C.L.I. Form by the appellant for the period in question did not tally with the description in the invoices for the same period. The content of the C.L.I. Form has been excerpted in the Tribunal's order and it is clear therefrom that no attempt was made to describe the goods at all, let alone fully or truly. The requirement for disclosure was clear, unambiguous and categoric. There was no scope for misunderstanding or misinterpretation. The respondent's reliance on diverse decisions of this Court in which it was held that there could be said to be no suppression or wilful misstatement related to cases where it was necessary to interpret a particular provision of law. Where the assessee had proceeded on a misinterpretation fo a legal provision, this Court appears to have held that the bona fides could not be called into question. Those decisions are distinguishable since in this case there was no question of the assessee failing to comply with the requirement of the Rule by reason of any alleged misinterpretation of the Rule. Had the assessee given a full description of the excisable goods but claimed classification under a wrong Tariff heading, the principle enunciated by this Court and as relied upon by the respondent may have been applied but that has not happened here.

19. Apart from this we cannot ignore the fact that the respondents had, consequent upon the issuance of the exemption notification of 1.3.1988, itself, classified the goods under Tariff Heading 87.05 and given a full description of the goods for the first time while claiming the exemption. It is true that subsequent to the amendment Notification, dated 14.2.1988, the respondent had replied for reclassification under Tariff Heading 84.30. But this will not detract from the initial claim of the respondent that its goods were properly classifiable under Heading 87.05 nor does it explain why the respondent did not describe the goods fully in its application for approval of its classification list for the relevant period."

27. With regard to the aspect of extended period of limitation and the penalty leviable on the assessee, the learned counsel had relied on the following decisions:

27.1. In Indian Petrochemicals Corporation Ltd. Vs. Collector of C.Ex. ([1992 (57) E.L.T. 485 (Tribunal)], it has been held that that where the assessee disclosed manufacture of petroleum resin, obtained L-4 licence for it and got its classification determined but not disclosed that raw naphtha obtained under Chapter x procedure would be utilised for its manufacture via `C8C9 cut'- Such use being against the terms of exemption Notification Nos.75/84-C.E., dated 1.3.1984 and 27/89-C.E., dated 1.3.89, charge of suppression of fact and evasion of duty proved, the extended period of limitation was invokable and the penalty is leviable by invoking Section 11A of the Central Excises and Salt Act, 1944 and Rule 173Q of the Central Excise Rules, 1944. (paras 38 and 39)

27.2. In Vapi paper Mills Ltd., Vs. Collector of Central Excise [1993(67) E.L.T. 109 (Tribunal)], it was held that where the assessee clearing board but mis-declaring it as kraft paper in classification list and clearance and sale documents in order to avail the benefit of concessional rate applicable to paper, the charge of suppression and intent to evade duty proved and therefore, the extended period of limitation was applicable in accordance with Proviso to Section 11A(1) of the Central Excises and Salt Act, 1944.

27.3. In Utkal Galvanizers Pvt. Ltd., Vs. Collector of Central Excise, BBSR [1999 (107) E.L.T. 70 (Tribunal), it was held that the extended period of limitation, invokable under Section 11A of the Central Excise Act, 1944, would apply when there is suppression of relevant facts by the non-inclusion of cost of raw materials and that the determination of assessable value is made only by taking into account the job charges.

27.4. In Synthetics & Polymer Industries Vs. collector of C.Ex., Ahmedabad (1998(104) E.L.T. 659 (Tribunal), it has been held as follows:

> "We are unable to accept these arguments- the appellants who are the manufacturers of the product cannot disclaim knowledge that their product is a chemically modified phenol formaldehyde. They have not furnished any basis for their belief that the disputed product was chemically and commercially as the same phenol formaldehyde. In these circumstances, the charge of misclassification is sustainable. It is not mere inaction on the part of the appellants but a positive act of concealment of the fact that the disputed product was a chemically modified phenol formaldehyde resin. The reason for the deliberate misclassification is not far to see – the appellants' intention is clear from their claim to the benefit of Notification 133/86 which prescribes rate of duty of 15% ad valorem (as against the tariff rateof 25%) which is available to only phenol formaldehyde failing under sub-heading 3909.51 and not to chemically modified variety classifiable under CETA 3909.59 which we have held to be the appropriate classification in our finding in the

para above. The case law cited by the learned counsel is distinguishable as in that case, the Tribunal held that the respondents therein had not suppressed any material fact regarding the description of the goods, while in the present case, the appellants are guilty of concealment/deliberate non-disclosure of the description of goods as chemically modified phenol formaldehyde. We, therefore, hold that the extended period of limitation has been rightly invoked and that the demand is not hit by time bar. We also hold that penalty is warranted in the facts and circumstances of the case. In the light of the above, we uphold the impugned order and reject the appeal."

28. Even though the learned counsel for the petitioner had raised a number of issues said to be in favour of the petitioner, relying on various decided cases, he had submitted, at this stage of the hearing of the writ petition, that it would suffice if the final order of the first respondent Tribunal, dated 18.4.2000, made in Appeal No.E/441/98, is set aside and the matter is remitted back to the first respondent Tribunal with a direction to dispose of the Appeal No.E/441/98, on merits and in accordance with law, considering, afresh, the issues arising for adjudication, in particular, the issue as to whether the concerned authorities of the Customs and Central Excise Department could invoke the provisions of Section 11A of the Central Excise Act, 1944, to make the duty demand and to levy the penalty, as per the order (Original) No.C.Ex.84/97, dated 6.11.97, passed by the Commissioner of Central Excise, Hyderabad.

29. In view of the submissions made by the learned counsels appearing on behalf of the petitioner, as well as the second respondent and on a perusal of the records available, it is clear that the preliminary objection raised on behalf of the second respondent is devoid of merits. When the order impugned has been passed by the first respondent Tribunal, which is located at Chennai, it cannot be said that this Court would not have the jurisdiction to decide the writ petition pending on the file of this Court, as held by the Supreme Court in Kusum Ingots and Alloy Limited Vs.Union of India [2004(168) E.L.T. 3 (S.C.)].

30. In view of the fact that it has been stated that the first respondent Tribunal had not considered all the issues arising for its decision, especially, the applicability of the first proviso to Section 11A of the Central Excise Act, 1944, to the petitioner, in the light of the decision of Collector of Central Excise, Baroda Vs. Cotspun Ltd. (1999(7) SCC 633), decided by the Supreme Court and the effect of the amendments brought about by the Finance Act, 2000, which was in the form of a Bill in the Finance Bill, 2000, at the

time when the final order was passed by the first respondent Tribunal, and in view of the limited prayer of the learned counsel appearing on behalf of the petitioner and considering the fact that certain aspects, as noted above, had not been considered, when the first respondent Tribunal had passed the impugned order, dated 18.4.2000, the final order of the first respondent Tribunal, dated 18.4.2000, made in Appeal No.E/441/98, is set aside and the first respondent Tribunal is directed to pass appropriate orders, on merits, and in accordance with law, considering all the relevant issues, in particular, the applicability of the first proviso to Section 11A of the Central Excise Act, 1944, to the petitioner, uninfluenced by its findings in its earlier decision, dated 18.4.2000. Accordingly, the writ petition is disposed of, with the above directions. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

csh

To

1. The Customs, Excise and Gold (Control)
Appellate Tribunal, Chennai.

2. The Commissioner of Central Excise
Hyderabad.

1 cc to Mr.S.M. Deenadayalan, CGSC, Sr. 72074

Writ Petition No.3081 of 2001

JP (CO)
kk 7/1