
(2003) 07 BOM CK 0128
In the Bombay High Court
Case No : Writ Petition No. 1277 of 1989

Blue Star Limited

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 01-07-2003

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 14, 2

Citation : (2003) 161 ELT 141

Hon'ble Judges : V.C. Daga, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : M. Sanklecha and Kapadia, instructed by Daftari Ferreira and Divan, for the Appellant; R.V. Desai and N.V. Masurkar, for the Respondent

Final Decision : Dismissed

Judgement

J.P. Devadhar, J.—This petition challenges the order of the Collector of Central Excise, Bombay dated 9-8-1989, wherein the Collector has confirmed the demand raised against the Petitioner's vide show cause notice dated 31st July, 1986 for recovery of excise duty amounting to Rs. 48,40,347/- u/s 11A of the Central Excises and Salt Act, 1944 ("Act" for short) and has also levied penalty of Rs. 10,00,000/- under Rule 173Q of the Central Excise Rules, 1944 (Rules for short). The aforesaid recovery is on account of 208 cabinets of walk-in-cooler manufactured and said to have been cleared by the Petitioners during the period from July, 1981 to 7-2-1986 without payment of Excise duty.

2. The facts relevant for the purpose of the present petition are that;-

The petitioner Company at the relevant time inter alia manufactured walk-in-coolers which are used for preservation of medicines, food and other perishable articles. The said walk-in-coolers were of varying sizes depending upon the specifications and requirements of each customer. The said walk-in-coolers consist of two parts namely: (1) cooling unit and (2) Cold room. The cooling unit is a complete refrigerating equipment consisting of condensing unit (with

compressor) and evaporating unit with motors. The Cold room is made of the size required by the customer with wooden flooring at the bottom and assembly of prefabricated panels on all sides and also at the top (ceiling). These panels are insulated panels with G.I. sheets, wooden frames and insulation in between. One of the side panels would have insulated doors with door frame for entry into the walk-in-cooler. The cooling unit is fixed to one of the ceiling insulated panel. In short the walk-in-cooler is like a container with four sides and a roof made by the assembly of various insulated panels and has a wooden flooring at the bottom. One door is fixed on one of the panel for entry into the cooler and on one of the ceiling panel a cooling system is fixed. The assembled panels are covered with strips for maintaining low temperature inside the walk-in-coolers during usage.

3. The Petitioners have always been purchasing cooling units from the suppliers in the market. The dispute in the present case is whether the cold room for walk-in-coolers erected by the Petitioners by the assembly of insulated panels can be said to be a cabinet i.e. a part of walk-in-cooler falling under Tariff Item 29 A (3) of the erstwhile Central Excise Tariff.

4. According to the Petitioners, during the period from 1979 to February, 1985, they were not manufacturing insulated panels in their factory and they used to supply materials to independent contractors doing carpentry work and those persons used to make insulated panels on job work basis as per petitioner's orders. According to the petitioners, the elementary work of assembling the insulated panels like matching the panels for the purpose of adjustment to conform the specification, carried out in their factory, could not be said to be making a cold room. According to the Petitioners, during such assembly of the insulated panels, the panel comprising of door and door frame with latch, hinges and lock would not be there and even the insulated panels which were assembled were loosely bolted and had no covering strips fixed which prevents loss of cold air. In short, according to the Petitioners, there was no assembly of insulated panels in to a full-fledged cold room because the insulated panels prepared by the contractors/job workers were despatched to the job sites directly without sending them to the Petitioners factory, except for one specific ceiling panel, which was sent by the Petitioners to the supplier of the cooling unit for fixing the cooling unit on it. The said ceiling panel fitted with the cooling unit was also directly sent by the cooling unit supplier to the job sites. At the job site the Petitioners used to install walk-in-coolers by assembly of insulated panels with various other parts brought and/or supplied with bolts and covering the same with strips which prevents loss of cold air.

5. Thus, according to the Petitioners, the cold room was erected only at the site of the customer and not in their factory. It is the case of the Petitioners that during the period from June, 1984 to February, 1985, there was a lock out in the Petitioners Company and consequently all activities were stopped. After lifting the lock out on 19th February, 1985, the Petitioner Company for the first time commenced manufacture of insulated panels at their factory. The Petitioners

thereupon filed classification list stating therein that the insulated panels manufactured by them with effect from 4-4-1985 are classifiable under Tariff Item 29A(3) of the Central Excise Tariff. The said classification list was approved by the Respondents on 17-7-1985. However, no excise duty was payable on the insulated panels in view of the Exemption Notification No. 80/62-CE., dated 24-4-1962. For the sake of convenience, the Tariff Item 29A as it then stood is reproduced here-in-below: -

Item No. Tariff Description Rate of Duty

29A REFRIGERATING AND AIR-CONDITIONING APPLIANCES AND MACHINERY, ALL SORTS AND PART THEREOF

(1) Refrigerators and other refrigerating appliances, which are ordinarily sold or offered for sale as ready assembled units, such as ice makers, bottle, coolers, display cabinets and water coolers.

Thirty per cent ad valorem

(2) Air-conditioners and other air-conditioning appliances, which are ordinarily sold or offered for sale as ready assembled units, including package type or air-conditioners and evaporative type of coolers.

Thirty percent ad valorem

(3) Parts of refrigerating and air-conditioning appliances and machinery, all sorts.

Forty percent ad valorem

6. On 7th February, 1986 the Officers of the Excise Department visited the factory of the Petitioners and detained an assembly of insulated panels (in transportable section) on the ground that it was a cabinet i.e. and excisable part under Tariff Item 29A(3) of the Excise Tariff. The Excise Officers recorded the statements of various persons present at the factory regarding the manufacturing activities carried out in the factory. On 18-3-1986 the detained assembly of insulated panels as well as several incriminating documents found in the branch Offices of the Petitioner Company were seized. On the basis of the statements recorded and on verification of the seized documents, a show cause noticed dated 31-7-1986 was issued to the Petitioners stating therein that during the period from July, 1981 to 7th February, 1986, the Petitioners had manufactured and cleared 208 cabinets of walk-in-coolers of various models falling under the erstwhile Tariff Item 29A(3) of the Central Excise Tariff by suppressing the facts about the manufacture of the said cabinets with intention to evade payment of excise duty. By the said show cause notice, the Petitioners were called upon to show cause as to why excise duty should not be demanded and recovered from them under Rule 9(2) read with proviso to Sub-section (1) of Section 11A of the Act on the said 208 cabinets falling under Tariff Item 29A(3) which were removed by the Petitioners from their factory in dismantled condition for easy transportation to the site, during the period from July, 1981 to 7th

February, 1986. The Petitioners were also called upon to show cause as to why penalty should not be imposed upon them under Rule 173Q read with other Rules.

7. The Petitioners in their reply to the show cause notice inter alia denied that they were engaged in the manufacture of cabinets of walk-in-cooler. It was stated in their reply that the manufacture of insulated panels and insulated doors with door frames required for making the cold room was undertaken by the Petitioners only in the year 1985 and prior thereto the insulated panels were got manufactured from independent contractors on job work basis. It was stated that at all times the insulated panels manufactured by the job worker were taken to the site directly and therefore, manufacturing any excisable part of walk-in-cooler in their factory did not arise at all. It was stated that the elementary work of assembling the insulated panels for the purpose of matching and adjustment to conform to the specification of the customers was carried out in their factory. Such assembly of insulated panels without the insulated doors and without the ceiling panel fitted with cooling unit, could not be said to be manufacturing a cold room in the Petitioner's factory. It was stated that when this Court in the Petitioner's own case reported in *Blue Star Ltd. Vs. Union of India* and another, has held that the walk-in-cooler erected at site is not excisable under Tariff Item 29 A (3) of the Central Excise Tariff, the cold room erected at site cannot be said to be a cabinet excisable under Tariff Item 29A(3) of the Central Excise Tariff. It was stated that the statements of the persons recorded u/s 14 of the Excise Act were not correctly and fully recorded and the Petitioners have clarified the correct position by the letters and/or affidavits of the said persons whose statements are relied upon by the Department. It was stated that the entire activity carried out by the Petitioners was known to the Respondents because one Central Excise Inspector deputed by the Respondent was always present at the factory of the Petitioners and was fully aware of the activity carried on by the Petitioners and, therefore, the Petitioners cannot be held to be guilty of suppressing any material facts.

8. By the impugned order dated 9th March, 1989, the then Collector of Excise, after hearing the Petitioners passed an order inter alia confirming the demand for recovery of excise duty amounting to Rs. 48,40,347/- demanded u/s 11A of the Act. The Collector of Central Excise also levied penalty of Rs. 10,00,000/- on the Petitioners under the provisions of Rule 173(Q) of the Rules. Challenging the aforesaid order, the Petitioners have approached this Court by filing the present Writ Petition.

9. Mr. Sanklecha, learned Counsel appearing on behalf of the Petitioners broadly advanced two fold arguments. Firstly, he submitted that there is nothing like manufacture of a cabinet while erecting a walk-in-cooler. According to him, walk-in-cooler is erected by assembling insulated panels at site. That the walk-in-cooler consists of cooling system and cold room. That the cooling system is purchased from a supplier and the cold room is erected at the site by assembly

of insulated panels. That during the relevant period from 1979 to 1985 the insulated panels were got manufactured from an independent contractor on job work basis which were sent to the site directly and, therefore, when, neither the panels nor the cold room were manufactured at the Petitioners factory, on liability could be fastened upon the Petitioners. Secondly, it was submitted that the claim made by the Revenue for recovery of excise duty beyond the period of six months, was barred by limitation. It was contended that the entire activity carried out by the Petitioners was known to the respondents and the Petitioners could not be held to be guilty of suppressing material facts and, therefore, the extended period of limitation provided u/s 11A of the Act could not be invoked.

10. Elaborating his first contention, Mr. Sanklecha submitted that during the years 1981 to 1985 the Petitioners got insulated panels manufactured from independent contractors and the said panels on manufacture were sent by the contractor to the site directly for erecting the walk-in-coolers and hence assembling insulated panels into the cold room for walk-in-cooler in their factory did not arise at all. He submitted that without dealing or discussing this aspect the Collector erroneously held that the Petitioners are liable to pay excise duty on the cabinets allegedly manufactured by the Petitioners. He submitted that merely because some of the insulated panels were loosely assembled in the Petitioners factory to see as to whether they fit in properly or not. It could not be said that the Petitioners were manufacturing cabinets for walk-in-coolers. He submitted that even assuming that the Petitioners at the relevant time manufactured the insulated panels in their factory, the same were exempt by Notification No. 80 of 1962 and, therefore, no excise duty was leviable in respect of said insulated panels. It was submitted that if it is the case of the revenue that the Petitioners manufactured and cleared the cabinets from their factory, then it was for the Revenue to establish that the cabinets were in fact manufactured by the Petitioners in their factory and thereafter dismantled it and transported to the site. He submitted that in the instant case, no such finding has been recorded and, therefore, no excise duty could be claimed from the Petitioners.

11. Mr. Sanklecha further submitted that when this Court in the Petitioners own case reported in Blue Star Ltd. Vs. Union of India and another, , has held that the walk-in-coolers manufactured by the Petitioners at site are not excisable, the question of levying excise duty on the parts of the said walk-in-cooler erected at site does not arise at all. By relying upon the decision of the Apex Court in the case of Collector of Central Excise, Baroda Vs. M/s. M.M. Khambhatwala, he submitted that the Petitioners being raw material supplier to a job worker, the Petitioners could not be held to be manufacturer of insulated panels. Referring to the statements of various person recorded by the Excise Authorities, the Counsel submitted that the said persons had filed letters/affidavits before the Collector of Central Excise explaining the circumstances and the true purport of their statements recorded by the Excise Officers. He submitted that the statement made by the contractor of the Company was with reference to the activity carried on after the petitioners commenced manufacture of insulated panels in 1985 and

not for the period prior to 1985. Mr. Sanklecha submitted that the findings given by the Collector of Central Excise to the effect that "it is now well settled that a person who gets his goods manufactured by using hired labour is a manufacturer for purpose of Central Excise Act" is contrary to the law laid down by this Court and by the Apex Court. He submitted that the contractors appointed by the Petitioners were independent contractors and the transactions were at arms length. The Counsel submitted that in view of the subsequent clarificatory letter/affidavits issued, the statements recorded u/s 14 of the Act, lost their efficacy because what was stated by those persons was with reference to the facts relating to the period subsequent to the 1985 when the Petitioners started manufacturing insulated panels and not for the period prior thereto.

12. Turning to the second contention, Mr. Sanklecha submitted that the Show Cause Notice dated 31-7-1986 was issued to recover the excise duty payable on alleged clearances of 208 cabinets of walk-in-coolers during the period July, 1981 to February, 1986. At the relevant time the limitation prescribed for recovery of duty not levied or not paid or short levied or short paid u/s 11A of the Act was six months. Since the show cause notice pertained to that period beyond six months, it was submitted that the claim was barred by limitation. He further submitted that the extended period of limitation provided u/s 11A of the Act could not be invoked in the present case because at all times, a Central Excise Inspector was posted by the Respondents in the factory of the Petitioners and therefore, the Respondents were aware of all the activities carried out in factory of the Petitioners. Under these circumstances, it was submitted that the Petitioners could not be held to be guilty of suppressing material facts and consequently the extended period of limitation could be invoked. He submitted that before the veil of six months limitation could be lifted, the Department must establish that there was suppression of facts on the part of the petitioners. He relied upon the decision of the Apex Court in the case of Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay, and submitted that to constitute suppression there must be wilful intention to evade duty. He submitted that in the present case, in the absence of any finding to the effect that there was any wilful intention on the part of the Petitioners to evade duty, the extended period of limitation could not be invoked. He also relied upon the judgment of the Apex Court in the case of Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay, and submitted that when facts are known to both the parties, omission to do something does not render the same as suppression. He submitted that in the instant case since the activities carried out by the Petitioners were known to the Department, the Petitioners could not be held to be guilty of suppressing material facts. He then relied upon the judgment of the Apex Court in the case of Tamil Nadu Housing Board Vs. Collector of Central Excise, Madras and Another, and submitted that the extended period is applicable only when one deliberately avoids payment of duty. He submitted that in the absence of any findings to the effect that the Petitioners deliberately avoided payment of duty, the extended period of limitation could not be invoked in the

instant case. On the basis of the judgment of the Tribunal in the case of Synthetics & Chemicals Ltd, v. Collector of Central Excise reported in 1992 (57) E.L.T. 480 (Tri) the Counsel submitted that the extended period of limitation could not be invoked especially when the excise officer posted at the Petitioner's factory was aware of all activities carried on in the factory. He also relied upon the judgment of the Apex Court in the case of Hindustan Ferrodo Limited v. Collector of Central Excise, Bombay reported in 1997 (89) E.L.T. 16 (S.C.) and submitted that the classification proposed by a party should be accepted unless the department leads evidence for different classification. He submitted that in the instant case no evidence was led to the effect that the Petitioners had manufactured cabinet and hence demanding the duty thereon does not arise at all.

13. Mr. Sanklecha then submitted that even assuming for the sake of argument it is held that the Petitioners manufactured parts of walk-in-coolers during the period from 1981 to 1985, then, in view of the Judgment of this Court in the Petitioners own case and the decision of the Allahabad High Court in the case of Mother India Refrigeration Industries P. Ltd. Vs. Superintendent of Central Excise and Others, . The Petitioners were justified in believing that the parts covered under the Tariff Item 29A(3) should be such as are ordinarily sold or offered for sale as ready assembled units and that the parts of a complete plant erected at the site are outside the purview of Tariff Item 29A(1)(2) as well as (3). He submitted that when the aforesaid judicial view in favour of the Petitioners was prevailing at the relevant time [though reversed by the Apex Court subsequently in the case of Frick India Limited v. Union of India reported in 1990 (48) E.L.T. (627) the Petitioners were justified in believing that the parts of walk-in-coolers manufactured by them were not excisable. In this view of the matter it was submitted that the recovery of duty and levy of penalty against the petitioners was barred by limitation and the impugned order is liable to be quashed and set aside.

14. Mr. Desai learned Senior Counsel appearing on behalf of the Respondents, on the other hand supported the decision of the Collector of Central Excise, Bombay. Mr. Desai submitted that the ratio laid down by this Court in the Petitioner's own case reported in Blue Star Ltd. Vs. Union of India and another, is wholly irrelevant to the present case because the issue in that case pertained to classification of walk-in-coolers under Tariff Entry 29A(1) of the Tariff and there was no issue pertaining to the excisability of the Parts of walk-in-cooler falling under Tariff Item 29A(3) of the Central Excise Tariff. Mr. Desai submitted that from the voluminous evidence on record which is set out in the impugned order of the Collector of Central Excise. It is clear that the cold room/cabinet was manufactured by the Petitioners in their factory and after inspection; testing and approval, the said cold room/cabinet was dismantled by unscrewing the nuts and bolts for easy transportation to the site of the customer where the walk-in-cooler is to be installed. Mr. Desai referred to various statements of the persons recorded by the Excise Officers and submitted that in view of the clinching

evidence on record it was established beyond shadow of doubt that the Petitioners were all along manufacturing and clearing cold room/cabinets for walk-in-cooler without declaring and without paying excise duty payable thereon. Mr. Desai submitted that from the conduct of the Petitioners enumerated in the impugned order it is clear that the Petitioners suppressed facts with a view to evade duty and, therefore no fault could be found with the order impugned in the petition and accordingly submitted that the petition be dismissed with costs.

15. Before dealing with the rival contention, it is necessary to consider as to what is meant by cabinet and whether a cold room of a walk-in-cooler can be said to be a cabinet falling within Tariff Item 29A(3) of the erstwhile Central Excise Tariff. The Tariff Item 29A(3) itself does not set out as to what items can be said to be part of the refrigerating or air-conditioning appliances. Exemption Notification No. 80/62-CE., dated 24-4-1962 issued by the Central Government under Rule 8(1) of the Central Excise Rules, 1944 exempt all parts of refrigerating and air-conditioning appliances and machinery falling under Item 29A of the First Schedule in the Central Excise Act, 1944 except the parts specifically set out therein. Cabinet is one such part set out in the said Notification which is not exempted. Therefore, it is clear that the cabinet is a part of the refrigerating and air-conditioning appliances falling under the erstwhile Tariff Item 29A(3) of the Central Excise Tariff. The next question to be considered is whether the walk-in-coolers consist of a part which can be called as a cabinet? From the facts set out hereinabove it is clear that the walk-in-cooler is like an air-conditioned room made according to size, whose flooring is wooden in nature and its side walls with one or more doors and the roof consist of assembled insulated panels and instead of an air-conditioner there is a cooling system fixed on the top of one of the ceiling panel. Inside the walk-in-cooler medicines and other perishable articles can be stored and whenever need a person can easily enter the walk-in-cooler and take out the item stored therein. Thus a cold room with a cooling unit attached to one of the ceiling panel constitutes a walk-in-cooler. This cold room according to the revenue is a cabinet falling under Tariff Item 29A(3) of the Central Excise Tariff. It is not in dispute that the cold room is a part of the walk-in-cooler. A cabinet in the ordinary parlance is an enclosed container or a room with drawers/shelf for storing valuable articles or things. Cold room of a walk-in-cooler fits into the category of a cabinet as it is enclosed from all sides with insulated panels and has a door for entry into walk-in-cooler where valuable articles are stored. In this view of the matter, we are of the opinion that the Collector of Central Excise was justified in treating the cold room of walk-in-cooler as a cabinet falling within the meaning of Tariff Item 29A(3) of the Central Excise Tariff.

16. According to the Petitioners, even assuming that the cold room is a cabinet, the same was not erected at their factory and the same was erected at site by assembly of insulated panels and other materials brought from outside. According to the Petitioners, the principle items required in making a cold room is insulated panel and till 1985 they were getting the insulated panels

manufactured on job work basis and it is only after February, 1985 the Petitioners started manufacturing insulated panels in their factory. These insulated panels were sent by the independent contractors to the site directly where the walk-in-cooler with cold room was erected by assembly of insulated panels with other materials and therefore, according to the Petitioners, making a cold room at the Petitioners factory did not arise at all.

17. The first contention of the Petitioners that at the relevant time i.e. during the years from 1979 to 1985 even the insulated panels required for cold room were got manufactured from an independent contractor on job work basis is patently false and contrary to the facts on record. Shri Raham-tulla Lalmohamed in his statement recorded on 7-2-1986 u/s 14 of the Excise Act stated that he is a contractor working in the carpentry section of the Petitioners factory for last 15 years and he used to make cabinets for the walk-in-coolers and explained the process involved therein as follows :

"First I made a frame of wood, then I put thermocol in the wooden frame, then I close this frame after but finishing with galvanised sheets on both sides and cover all the four sides with wooden patties. Thus the wooden frame is stuffed with but finished thermocol with galvanised sheets on both sides form one panel. These panels are then joined with other similar panels with nut and bolts as per drawing given to me by company. These panels when assembled together with the help of nuts and bolts from all the sides with bottom and roof forms the cabinet. The cabinet becomes complete in all respect when the door is fixed to the cabinet along with hinges, handles etc. These cabinets are sectional built out of such panels and can be dismantled after unscrewing nuts and bolts. The dismantling is only for the purpose of transport as the same has to be refitted alongwith same nuts & bolts at site. My labour charges for manufacture of such cabinet varies from Rs. 800/- to Rs. 1400/-. I make about 2 to 3 cabinets per month. I have about twelve workers out of which five are engaged in manufacture of such cabinets the remaining 7 workers are utilised for manufacturing of crates etc. So far as cabinets for walk-in-cooler are concerned. I make the insulated panels, join them with other panels from all the four sides and with roof and bottom and fix the door along with handles, hinges etc. as such the cabinet is complete in all the respects along with necessary notes handles and hinges etc. and hand over the same to the company. These cabinets are inspected and tested by the company. After such inspection and testing by the company the same are dismantled into panels by unscrewing the nuts and bolts for transport to the destination in knock down condition but complete in all respect along with nuts and bolts. My total contract charges for carpentry work on contract work comes to about 8 thousand. All the material like, wood, nails, Thermocol, bitumen , handles, hinges, nuts and bolts are supply to me by the company. I only get the labour charges. I have already produced before you the two drawings in respect of the cabinet which has been detained by you today and whose photographs you have taken today. In have produced before you another five more drawings on the basis of which I make the cabinets."

The above statement was corroborated by Mr. Puri, Vice President of the Petitioner company who in his statement recorded u/s 14 of the Central Excises and Salt Act inter alia stated as follows :-

"The Cold room is made out of pre-fabricated panels. These panels are themselves made from wooden frame by the carpenters in between they put thermocol insulation and then put galvanized sheets on top and bottom. Carpenters fit these panels into room to see the accuracy of the workman-ship and then they dismantle it. These cold room is dismantled only after our Officers inspect and approves the quality of the workman-ship. These cold room are passed by our Quality Control Inspector after inspection. Only after he certify the quality. These cold rooms are dismantled for despatch to our branch officers in knock down condition". One of the panel is known as door panel on which hinges, locks and handles are fitted. We make these cold rooms in our factory against the internal orders received from our branch offices."

Shri A.G. Wadhwani, Quality Control Inspector working with the Petitioners for 24 years. In his statement recorded u/s 14 of the Excise Act inter alia stated as follows:

".....When the carpenter completes the erection of walk-in-cooler complete in all respects along with door fixed with hinges and handles, he informs me and I go and inspect the walk-in-cooler and if no defects are noticed. I okay the walk-in-cooler. I accordingly inform my incharge Shri R. Krishna or at time Shri Vincent D Silva about my approval of the walk-in-cooler. Further it is left to them to arrange for arranging the despatch of walk-in-cooler."

Shri Vincent D Silva Marketing Executive of the Petitioners in his statement recorded u/s 14 of the Excise Act inter alia stated as follows :-

"... As regards the walk-in-coolers are concerned, I am responsible for despatch of cabinet from the factory to our branch offices all over India. The entire system of supplying walk-in-coolers to our branch offices is as under :-

I receive the orders from the Marketing office situated at Mittal Towers as well as from branch offices for supply of walk-in-coolers. I pass on the orders to the Commercial department situated in the factory premises. I also inform the Materials Department for supplying the contractor for carpentry with the required materials. We have the standard drawings in respect of 4 models of walk-in-coolers, i.e. Model-ORG 260, ORG 590, ORG 900 and ORG 1200. The carpenter make the panels and erects the cooling room for the purposes of testing by Quality Control Department. The cooling room is complete only when the panels are fixed to each other with the help of nuts and bolts and door is fixed along with the hinges, handles and locks wherever necessary. This cold room i.e. cabinet for the walk-in-cooler is tested by the Quality Control Department and only when the quality control inspector okays the cabinet for the walk-in-cooler, the commercial departments orders for the dismantling of the cabinet into panels and door which prefabricated for purpose of despatch..."

Shri T. Ravindra, Commercial Officer of the Petitioner Company in his statement recorded u/s 14 of the Excise Act, has corroborated the aforesaid statements given by other officers of the Company.

18. From the aforesaid statements recorded u/s 14 of the Central Excise Act is clear that even prior to 1985 the cold room/cabinet for walk in coolers were manufactured in the carpentry section of the Petitioner's factory by contractor engaged by the Petitioners. The statement of the contractor corroborated by high ranking officials of the Company clearly establish that the said contractor was working in the carpentry Section of the Petitioners company for nearly a 15 years and the contractor manufactured insulated panels and assembled them into cold room by utilizing the raw materials, tools, machinery and power of the Petitioners and the entire work of the contractor was under the direct supervision of the quality control staff of the Petitioners and the so called independent contractor was only paid labour charges of Rs. 800/- to Rs. 1,400/- per cabinet depending upon the size of the cabinet. Therefore, the above evidence on record clearly establishes that the contractor engaged by the Petitioners was only a hired labourer and could not be called as an independent contractor or a job worker. When the same contractor who is working for the Petitioners Company for more than 15 years, states in his statement recorded in February, 1986 that he has been manufacturing insulated panels in the Petitioner's factory out of the raw materials supplied to him and under the direct supervision of the Petitioners, it is not open to the Petitioners to contend that prior to 1985, they were not manufacturing insulated panels in their factory. It is interesting to note that the contractor and the Officers of the Petitioner company have not retracted the statements recorded u/s 14 of the Excise Act in February, 1986, however, after the issuance of the show cause on 31-7-1986, the said contractor and the Officers of the company by their letter/affidavits dated 8th/9th September, 1986 sought to explain the contents of the statements recorded in February, 1986. In para 14 of the petition it is stated that while preparing reply to the show cause notice, it was noticed that the statements of the employees and the contractor were not correctly and fully recorded and, therefore, the Petitioners clarified the correct position by letters/affidavits of the persons whose statements were recorded u/s 14 of the Excise Act. Thus, it is clear that the explanation sought to be given to the statements recorded u/s 14 of the Excise Act is an afterthought and is at the benefit of the Petitioners. It is well established in law that even the retracted statements recorded under the provisions of the statute are binding upon the persons making the statements (see *Surjeet Singh Chhabra Vs. Union of India and others*, and *Bhana Khalpa Bhai Patel Vs. Assistant Collector of Customs, Bulsar, Gujarat and Another*, . In the present case the statements recorded u/s 14 of the Excise Act are not even retracted and therefore the said statements are binding in nature.

19. Even the subsequent explanatory letters affidavits of the contractor and the Officers of the company do not support the case put forth by the Petitioners. The contractor in his explanatory letter dated 6-9-1986 stated that he knew only

Urdu language and he did not know the contents of the statements recorded by the excise officers. However, he admitted in his explanatory letter that he has been working with the Petitioner's Company for quite a long time but the work of manufacturing insulated panels for walk-in-coolers was started by him only around May, 1985 on labour charges basis and not on salary basis. All the officers of the Petitioner Company have taken similar stand in their explanatory letter/affidavits. Thus, the entire case of the Petitioners is that prior to 1985 even the insulated panels for walk-in-coolers were manufactured by the job worker and not by the Petitioners. This contention of the Petitioners is falsified by the finding of fact recorded by this Court in the Petitioners own case in Miscellaneous Petition No. 223 of 1972, Blue Star Limited v. Union of India and Ors., decided on 7th March 1979 [1980 (6) E.L.T. 280 (Bom.)]. In that Judgment, it is inter alia recorded as follows :-

"The Petitioner-Company manufactures in its factory, panels lined with G.I. Sheets, wooden flooring, insulated doors lined with G.I. Sheets and cooling coils".

Thus, from the aforesaid Judgment delivered by this Court on 7th March, 1979 it is clear that even in the year 1979, the Petitioners were manufacturing insulated panels and insulated doors in their factory and the contentions raised in the present petition that prior to 1985 the Petitioners were getting the insulated panels manufactured from a job worker is totally false and contrary to the facts on record. In the petition the name of the alleged job worker has not been spelt out and even at the time of argument, counsel for the petitioners could not give the name of the job worker who is supposed to have manufactured insulated panels for the Petitioners prior to 1985. By no stretch of imagination, the hired labourer engaged by the Petitioners for manufacture of insulated panel in the Petitioner's factory by utilizing the raw materials, machinery, tools, equipments, power, etc. of the Petitioners can be said to be a job worker. The entire work of manufacturing insulated panels was done by the hired labourer at the Petitioners factory under the direction, supervision and control of the Quality Control staff of the Petitioners. Under the circumstances, the contention of the Petitioners that prior to 1985 the insulated panels were manufactured by a job worker, is totally false and that at all material times, the insulated panels were manufactured by the Petitioners in their own factory.

20. Once it is established that at all relevant times the insulated panels were manufactured in the factory of the petitioners, the next question to be considered is whether the said insulated panels were assembled into a cold room in the factory of the Petitioners? In the statements recorded u/s 14 of the Excise Act the contractor as well as all the high ranking officials of the Petitioners Company have categorically admitted that the assembly of insulated panels into a cold room was carried out in their factory and only after inspection and approval by the quality control staff of the Petitioners, the said cold room was dismantled for the purpose of easy transportation to the site, without retracting, the said statements were sought to be explained by stating that Petitioners used

to loosely assemble the insulated panels for size and specification and that there was no cold room as such erected at the Petitioners factory premises. As stated hereinabove, the categorical statements recorded u/s 14 of the Excise Act have evidentiary value and cannot be discarded unless strong and cogent material is brought on record to refute those statements recorded under the statute. In the present case no material has been produced by the Petitioners to establish that the statements recorded are incorrect. As stated hereinabove the contention of the Petitioners that prior to 1985 the insulated panels were manufactured by the independent job workers is falsified by the Judgment of this Court delivered on 7-3-1979 in Writ Petition No. 226 of 1972. It is the case of the Petitioners that the insulated panels were loosely assembled and the work of assembling insulated panels into full fledged cold room was not carried out in their factory. However, in their statements recorded u/s 14 of the Excise Act, the employees of the Petitioners including the Vice President of the Company have categorically stated that the cold room/cabinet complete in all respects were manufactured in the Petitioners factory and only after inspection and approval by the Quality Control Section, the said cold room was dismantled for easy transportation to the site. The categorical statements of the employees of the Petitioners recorded u/s 14 of the Act are further corroborated by the documents seized from the petitioners factory. In the letter dated 19-10-1985 Shri Vincent D Silva Marketing Executive of the Petitioners (See Exhibit to the affidavit-in-reply) had inter alia informed a customer as follows :-

"The panels are fabricated in the factory strictly as per drawings using the best quality of G.I. Sheets. Each and every walk-in-cooler is erected and inspected prior to despatch. All defects are rectified and the panels are numbered to facilitate better matching and easier erection."

By a letter dated 18-5-1985 (See Exhibit 4 to the affidavit-in-reply), one of the customers of the Petitioners (Ministry of Railways) confirmed having received from the Chandigarh office of the Petitioners to the effect that the cooling cabinet is now ready for inspection and by the said letter the Petitioners were called upon to keep the cooling cabinet ready in all respects for inspection on 22-5-1985 at the Petitioners factory at Thane. Thus, the voluminous evidence on record clearly establishes that the cold room or cool cabinet was erected and inspected by the quality control staff of the Petitioners as well as the Customers in the Petitioners as well as the Customers in the Petitioners factory prior to despatch. In this view of the matter, we uphold the findings of the Collector that at all material times, the Petitioners had manufactured cold rooms/cabinets in their factory and cleared the same after dismantling it for easy transportation.

21. The fact that one of the ceiling panel manufactured was sent to the supplier of cooling unit for mounting/fixing the cooling unit on to the ceiling panel does not in any effect the variety of the statements of the officers of the Petitioners Company that the assembly of insulated panels into cold rooms was carried out in their factory. Mr. Vincent D Silva, Marketing Executive of the Petitioners has

rightly stated in his statement that no further addition/modification to the cabinet of the walk-in-cooler is carried out at site and at the site there is no manufacture of cabinet involved and the dismantled panels are reassembled with the help of nuts and bolts. There is no reason to disbelieve this unrestricted statement of the Marketing Executive of the Petitioners which is also corroborated by the Vice President of the Petitioner-Company. It is impossible to believe that prior to 1985 insulated panels were manufactured by a job worker and that the job worker instead of sending the insulated panels to the Petitioners factory, used to send the same to the site directly, because firstly in the year 1979 this Court in the Petitioners own case had held that the Petitioners were manufacturing insulated panels in their factory and secondly, even the Petitioners till date are unable to spell out the name of the alleged job worker. Reliance placed on Exemption Notification No. 80/62-C.E. is also misplaced because the said notification does not exempt cold room/cabinet from payment of excise duty. Thus, on the basis of the statement recorded and on the basis of the correspondence exchanged between the Petitioners and its customers, it is conclusively established that at all times the manufacture of insulated panels and assembly of insulated panels into cold room/cabinet was carried out in the Petitioners factory and only on inspection and approval by the quality control staff of the Petitioners as well as the customers, the same was dismantled for easy transportation. However, taking undue advantage of the dismantling of the unit for easy transportation to the site, the Petitioners deliberately did not file classification list and did not pay excise duty in respect of those cabinets.

22. Now, let us turn to the second argument of the Petitioners that the chain for recovery of excise duty is time barred u/s 11A of the Excise Act. The basic contention of the Petitioners is that at all times one Excise Inspector was posted by the Department at the factory premises and, therefore, the Department must be held to be aware of all activities carried on in the factory and, therefore, it is not open to the department to contend that the Petitioners have suppressed facts and consequently, it is not open to the department to invoke the extended period of limitation prescribed u/s HA of the Act. We see no merit in this contention. Merely, because an Inspector is posted at the factory, it does not mean that no action can be taken against the manufacturer even if it is subsequently noticed that the said manufacturer has not filed classification list deliberately with a view to evade excise duty or, if it is subsequently noticed that the said manufacturer has clandestinely removed the goods from the factory. To constitute knowledge, both parties must be labouring under a common belief that an activity is either a manufacturing activity or not and that on the item manufactured whether the excise duty is payable or not. In this case, it is the case of the Petitioners that the assembly of insulated panels into cold room/cabinet was not carried out in their factory. On detailed investigation and after collecting voluminous evidence, the Revenue has arrived at the conclusion that the contention of the Petitioners is false and that the Petitioners were all through, manufacturing insulated panels and assemble them into cold room/cabinet in their factory and after inspection

and approval cleared the same in dismantled condition without payment of excise duty. It is not the case of the Petitioners that at all material times they were manufacturing cold room/cabinet for walk-in-cooler in their factory or that the Excise Inspector posted at their factory knew about the manufacture of cold room but was under the belief that the activity of assembling insulated panels into cold room was not a cabinet falling under Tariff Item 29A(3) of the Excise Tariff. On the contrary, the stand of the Petitioners is that leave aside the cold room, even the insulated panels required for assembly of cold room were not manufactured by them during the period from 1981 to 1985. This assertion of the Petitioners is falsified by the Judgment of this Court in the Petitioners own case dated 7-3-1979 and by the statements of the Officers of the Petitioner Company recorded u/s 14 of the Excise Act. Once the case put forth by the Petitioners is falsified by cogent evidence. It is not open to the petitioners to turn around and contend that the fact that the petitioners were manufacturing and wrongly clearing the cold room/cabinet without payment of excise duty was known to the department because an Excise Inspector was posted at the Petitioners factory. The Department can be said to have knowledge of those facts which are put forth or canvassed by the Petitioners. If the facts put forth by the Petitioners are found to be false, then it is not open to the Petitioners to contend that the facts other than those canvassed by the Petitioners must have been known to the revenue because any Excise Inspector was posted at the factory. Even though the Excise Inspector posted at the factory could have known the activity carried on by the Petitioners, his failure to detect the fraud does not absolve the obligation cast upon the petitioners to file proper classification list in respect of excisable goods and pay excise duty while clearing the said goods. It is not the case of the Petitioners that they were manufacturing cold room/cabinet in their factory and that this fact was known to the revenue. On the contrary, the Petitioners not only suppressed the fact that at all times the cold room/cabinet for walk-in-cooler was manufactured in their factory, but in fact, put on a false case that even the insulated panels required for cold room was manufactured by a job worker and not by the Petitioners. The Petitioners went to the extent of falsely claiming that the job worker, on manufacture of insulated panels used to send the panels directly to the site. As stated herein-above, there was no job worker and there was only hired labourer manufacturing insulated panels in the transportable Section of the Petitioners factory. In one breath the Petitioners contend that the insulated panels manufactured by the job worker were sent to the site directly without sending it to the Petitioners factory and in another breath, the Petitioners contend that even the insulated panels were loosely assembled in their factory for the purpose of matching and adjustment to conform to the specification of the customer. If the Petitioners were not manufacturing insulated panels and the insulated panels manufactured by the alleged job worker were directly sent to the site of the customers, then, how could the Petitioners loosely assemble the insulated panels in their factory for the elementary work ? It cannot be said that only after 1985 the Petitioners assembled insulated panels into cold room because, it is now conclusively

established that even prior to 1985, the Petitioners were manufacturing insulated panels in their factory and assembling the same into a cold room/cabinet. Therefore, in the light of the unrestricted statements of several high ranking officials of the Petitioner Company as well as the documents seized from the Petitioners factory, it is conclusively established that at all times the petitioners manufactured insulated panels in their factory and assembled the same into cold room in their factory and only after inspection and approval by the quality control section as well as the customer, it was dismantled for easy transportation to the site. Thus, the evidence on record clearly establish that the cold room/cabinet was manufactured in the Petitioners factory and only after it was approved by the customer it was cleared from the Petitioners factory without payment of excise duty. These facts were not disclosed by the Petitioners either in their books or to the Excise Officer posted at the factory. Under these circumstances it cannot be said that the department had knowledge about the work of assembly of insulated panels into cold room/cabinet carried out in their factory. Therefore, the Petitioners have been rightly held to be guilty of suppressing the facts and the revenue has rightly invoked the extended period of limitation provided u/s 11A of the Excise Act.

23. The case of the Petitioners that during the period from 1981 to 1985 the insulated panels were manufactured by the job worker and that the job worker sent the insulated panels directly to the site without sending it to the Petitioners factory was apparently with a view to evade excise duty because if the job worker had sent the insulated panels directly to the site then the question of assembling the said insulated panels into cold room in the Petitioners factory would not arise and consequently paying excise duty on cold room/cabinet would not arise at all. It is now established by the Revenue that the alleged job worker was none other than the labourer hired by the petitioners and the said hired labourer was manufacturing insulated panels in the Petitioners own factory. Therefore, the contention of the Petitioners that the job worker used to send the insulated panels directly to the site, without sending it to the Petitioners factory is totally false. In fact, there was no job worker and the raw materials required for the manufacture of insulated panels was supplied to hired labourer working in the transportable section of the Petitioners factory. Under the circumstances, we have no hesitation in holding that the Petitioners have suppressed the facts and put up a false case with intention to evade payment of excise duty and the extended period of limitation has been rightly invoked in the present case.

24. Alternate contention of Mr. Sanklecha was that in the light of the decision of this Court dated 7-5-1979 in the Petitioners own case and the decision of Allahabad High Court in the case of Mother India Refrigeration Industries P. Ltd. Vs. Superintendent of Central Excise and Others, , the Petitioners were under the bona fide belief that Tariff Item 29A(3), covered only those parts which are ordinarily sold or offered for sale as ready assembled unit and therefore, in view of the aforesaid judicial decisions prevailing at the relevant time, no action could be taken against the Petitioners u/s 11A of the Excise Act, we see no merit in this

contention because firstly, in the assessee's own case decided by this Court on 7-8-1979 the issue therein was whether the walk-in-cooler manufactured at site can be said to be an article which is ordinarily sold or offered for sale as ready assembled unit falling under Tariff Item 29A(1) of the Tariff. Since the walk-in-cooler was admittedly erected at site, it was held that the walk-in-cooler does not fall under Tariff Item 29A(3). Moreover at that time the evidence collected by the revenue was that in one isolated case the Petitioners were found to be manufacturing walk-in-coolers in their factory. In those circumstances, it was held that on the basis of one isolated case. It cannot be said that the Petitioners were manufacturing walk-in-coolers in their factory. The issue as to whether the cold room/cabinet erected in the factory of the Petitioners is covered by Tariff Item 29A(3) or not was not considered in that case. Therefore, the Petitioners could not be said to be under the belief that the cold room/cabinet though manufactured in their factory it is not excisable. Secondly, even the decision of the Allahabad High Court in the case of *Mother India Refrigeration* (supra) [which is subsequently overruled by the Apex Court in the case of *Frick India v. Union of India* reported in 1990 (48) E.L.T.627 (S.C.) did not lay down any proposition of law that a part of refrigerating and air-conditioning appliances assembled in the factory of the assessee is not covered under Tariff Item 29A(3) of the Tariff. In that case, it was held, though erroneously, that the parts referred to in Tariff Item 29A(3) are those parts which answer the description given in Tariff Item 29A(1) and (2). This of the Allahabad High Court has been subsequently reversed by the Apex Court as stated herein-above. Even, the decision of the Allahabad High Court as it then stood at the relevant time did not support the case of the Petitioners because according to the Petitioners, they did not assemble insulated panels into cold room in their factory and, therefore, there was no question of their believing that the cold room manufactured in their factory was not covered under Tariff Item 29A(3) of the Excise Tariff. Under the circumstances, the Petitioners who have suppressed the fact that they assembled the insulated panels into cold room/cabinet in their factory cannot contend that they relied upon the decision of the Allahabad High Court in the case of *Mother India Refrigeration* (supra). Thirdly, the case of the Petitioners that in view of the aforesaid two decisions they bona fide believed that cold room manufactured is not covered under Tariff Item 29A(3) is falsified by the conduct of the petitioners viz. if the Petitioners had bona fide believed that the cold room is not covered under Tariff Item 29A(3), then there was no need for them to put up a false case that the insulated panels required for cold room were manufactured by the job worker and that the job worker sent the insulated panels directly to the site and that there was no occasion to erect the cold room at the Petitioners factory. The revenue has established that in fact at all times the insulated panels were manufactured in the Petitioners factory and the same were assembled into cold room/cabinet in their own factory and offered for inspection and on approval by the customer the said cold room/cabinet was cleared from the Petitioners factory. Thus the alternate contention of the Petitioners that in the light of the decision of this court in their own case and the decision in the Allahabad High Court referred

to hereinabove, they were under the bona fide belief that the cold room/cabinet is not covered under Tariff Item 29A(3) cannot be accepted.

25. Several decisions were cited by the Counsel for the Petitioners in support of his submissions. In our opinion, all those decisions are distinguishable on facts. The decisions of the Apex Court in the case of M.M. Khambatwala (supra) is distinguishable on facts as in that household ladies were manufacturing goods in their own premises and there was no supervision of the supplier in the manufacturing of goods by those house ladies. In the present case the contractor hired by the Petitioners was using the premises, machineries, tools, equipments, power of the Petitioners and he worked under the complete control and supervision of the Quality Control Staff of the Petitioners. Therefore, in the present case the contractor engaged on labour charges for the work done cannot be said to be independent contractor or job worker, even the contractor who has been working for the petitioners for 15 years on labour charge basis did not state either in his statement or in the explanatory letter that he was an independent contractor or a job worker. Moreover, in the present case the custody and control over the raw materials throughout remained with the petitioners and the work was done by the contractor as per the specific direction and under the direct control of the Petitioners. Therefore, the decision relied upon by the petitioners is distinguishable on facts.

26. The decision of the Apex Court in the case of Cosmic Dye Chemicals (supra) relied upon by the petitioners is also distinguishable on facts. In that case, on the date of filing declaration, the assessee bone fide believed that he need not include the value of the goods on the ground that the product was fully exempt. In the present case, the petitioners have falsely contended that they were not manufacturing the cold room in their factory, which contention has been proved to be false beyond doubt. The decision of the Apex Court in the case of Pushpam Pharmaceuticals Company (supra) relied upon by the petitioners is also not applicable to the present case. In that case before the Apex Court, there were conflicting decisions and in the absence of any rule under which the manufacturer was required to disclose the turnover of the exempted goods. It was held that the manufacturer cannot be said to have suppressed the facts. In the present case, the Petitioners put up a positive case that during 1981 to 1985. The insulated panels were manufactured by job worker and this case has been demolished by recording a clear finding of fact that the Petitioners at all times had been manufacturing insulated cables and assembling them into cold room in their factory, which was neither disclosed in the books maintained by the Petitioners nor the Petitioners filed any declaration and had sought exemption from payment of excise duty on cold room. The statements of the Petitioners employees recorded under the Act and the seized documents clearly establish that at all times the cold room/cabinet was erected in the Petitioners factory and the same has been suppressed by the Petitioners. The decision of the Apex Court in the case of Tamil Nadu Housing Board (supra) is also distinguishable on facts. In the present case, the Petitioners have falsely states that the insulated panels

were manufactured by a job worker and the said job worker used to send the insulated panels directly to the site and not to the Petitioners factory. Evidence adduced by the Revenue clearly shows that there was no job worker involved and in fact, the insulated panels were manufactured by the Petitioners themselves in their own factory with the help of hired labourer and a false case was put up by the Petitioners with a view to evade duty. As regards, the decision of the Tribunal in the case of Synthetic & Chemicals Ltd. v. Collector, Central Excise reported on 1992 (57) E.L.T. 480 (Tri), it is pertinent to note that in that case the bye-product was cleared on State excise gate passes and the assessee therein bona fide believed that the Central levy was not attracted. In the instant case the Petitioners always represented that the cold room was erected only at the site and not at the factory which is found to be false. No where it was disclosed that the cold room/cabinet was erected in their factory. Therefore, it cannot be said that the department knew that the cold room/cabinet was always erected in the Petitioners factory. The decision of the Apex Court in the case of Hindustan Ferodo (supra) is also distinguishable on facts. In that case it was held that the onus of establishing that the goods are classifiable under a particular tariff entry in on the revenue and if the onus is not discharged by the revenue the classification filed by the assessee must be accepted. In the present case, the Petitioners have not filed any classification list and their claim that the cold room/cabinet was not erected in their factory has been conclusive proved to be false. The Revenue has brought on record material to establish that the Petitioners have not filed the classification list in respect of the cold room deliberately with intend to avoid the payment or excise duty. Therefore, the decision of the Apex Court relied upon by the Petitioners does not support the case of the Petitioners.

27. For all the reasons stated hereinabove we see no reason to interfere with the order passed by the Collector of Customs, which is impugned in the present petition. On account of the interim stay granted by this Court at the time of the admission of the petition, the Petitioners have not paid the excise duty and penalty levied upon them. The Apex Court in the case of M/s. Style (Dress Land) Vs. Union Territory Chandigarh and Another, has held that when a party obtains stay from Court it is always at his own risk and responsibility. This Court in the case of Shri Balaji Automobiles Vs. Union of India (UOI), has held that if a person is deprived of his right to use his money such deprivation has to be compensated. Since the Petitioners on account of the stay order of this Court have utilised the amount of excise duty and penalty payable pursuant to the order of Collector of Central Excise, Mumbai dated 9-9-1989 and the revenue has been deprived of the said amount for all these years, it is just and proper that the Petitioners should pay the said amount to the Revenue with interest. Accordingly, we direct the Petitioners to pay to the Respondents the amount of excise duty and penalty levied by the Collector of Central Excise with interest at the rate of 12% per annum from 1-4-1989 within four weeks from today. If the Petitioners fail to pay the said amount of duty and penalty with interest at the rate of 12% per annum within four weeks from today, then the said amount of

duty and penalty as per the order of the Collector of Central Excise shall be recoverable with further interest at the rate of 18% per annum from 1-8-2003 till payment.

28. The petition is dismissed, with costs.