

**(2009) 10 DEL CK 0215**

**In the Delhi High Court**

**Case No :** Writ Petition (C) No. 2045 of 1998

I.T.C. Limited and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision :** 30-10-2009

**Acts Referred:**

Central Excise (Valuation) Rules, 1975 — Rule 5  
Central Excise Rules, 1944 — Rule 173Q  
Central Excise Rules, 1984 — Rule 9B, 9B(5)  
Central Excises and Salt Act, 1944 — Section 11A, 11A(3), 4, 4(1), 4(4)  
Customs Act, 1962 — Section 28

**Citation :** (2009) 164 DLT 433 : (2009) 171 ECR 175 : (2010) 250 ELT 189 :  
(2010) 7 RCR(Civil) 1740

**Hon'ble Judges :** A.P. Shah, C.J.;Rajiv Shakdher, J;Dr. S. Muralidhar, J

**Bench :** Full Bench

**Advocate :** R. Narain Sonu Bhatnagar Ajay Aggarwal Kanika Gomber and Rajan Narain, for the Appellant; A.S. Chandhiok, ASG, Mukesh Anand, R.C.S. Bhadoria and Sumit Balra, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Rajiv Shakdher, J.—A Division Bench of this Court vide its order dated 12.05.2000 referred the captioned case to a Larger Bench for adjudication of two issues:

(i) The applicability of Section 11A of the Central Excise and Salt Act, 1944 (in short the Act.) before and after the final order of assessment was passed.

(ii) The applicability of the judgment of the Supreme Court rendered in the case of M/s. Serai Kella Glass Works Pvt. Ltd. Vs. Collector of Central Excise, Patna, more particularly, paragraph 18 of the said judgment to the instant case.

2. The occasion for reference to a larger bench arose in view of the judgments of two separate Division Benches of this Court taking diametrically opposite views with respect to the issue as to whether a show cause notice, under the provisions

of Section 11A of the Act could be issued, pending final assessment of a show cause notice, issued prior in point of time.

2.1 In the case of *International Computers Indian Manufacturers Ltd. v. Union of India* 1981 ELT 632 (Del); the Division Bench held that a show cause notice u/s 28 of the Customs Act, 1962, (which is analogous to Section 11A of the Act), could not be issued, while a provisional assessment was pending finalisation. However, in *Duncans Agro Industries Ltd. Vs. Union of India and others*, , another Division Bench held to the contrary. Fortuitously, the evidently disparate views stand reconciled by virtue of a judgment of the Supreme Court in the writ petitioner's own case, i.e. *Commnr. Central Excise and Customs, Mumbai and Others Vs. I.T.C. Ltd. and Others*,

3. The issue in principle is no longer *res integra*. A show cause notice u/s 11A of the Act cannot be issued during the pendency of assessment proceedings. This is quite clear from the poser of the Supreme Court in the very opening paragraph of its judgment in the case of *ITC Ltd. (supra)*, and the observations made in paragraph 17 thereof. Being relevant, the same are extracted hereinbelow:

Completion of an assessment proceedings whether is a *sine qua non* for issuance of notice u/s 11A of the Central Excise Act, 1944 (for short ?The Act?) is the question involved in this appeal which arises of a judgment and order dated 18.06.2004 as modified by an order dated 02.07.2004.

...17. Section 11A of the Act provides for a penal provision. Before a penalty can be levied, the procedures laid down therein must be complied with. For construction of a penal provision, it is trite, the golden rule of literal interpretation should be applied. The difficulty which may be faced by the Revenue is of no consequence. The power u/s 11A of the Act can be invoked only when a duty has not been levied or paid or has been short-levied or short-paid. Such a proceeding can be initiated within six months from the relevant date which in terms of Sub-section (3)(ii)(b) of Section 11A of the Act (which is applicable in the instant case) in a case where duty of excise is provisionally assessed under the Act or the Rules made thereunder, the date of adjustment of duty after the final assessment thereof. A proceeding u/s 11A of the Act cannot, therefore, be initiated without completing the assessment proceedings.

3.1 Therefore, the first issue raised in the order of reference need not be answered by us except to reiterate the applicability of the principle enunciated in the case of *ITC Ltd. (supra)* to the facts of the present case.

3.2 In so far as the second issue is concerned, it is pertinent to note that the Supreme Court in *ITC Ltd. (supra)* has taken a note of its own judgment in the case of *Serai Kella (supra)*, and held that the principle enunciated by them is in consonance with the ratio of *Serai Kella (supra)*. We have dealt with this aspect, in greater detail, in the latter part of our judgment.

4. Faced with this circumstance, the learned Additional Solicitor General (in short

"ASG"), Mr. A.S. Chandhiok with usual dexterity, submitted that, the writ petition would have to be dismissed in view of the fact that, at the point in time when the show cause notice dated 28.01.1988 (i.e., which is impugned in the present writ petition) was issued, assessment proceedings were not pending. It was his submission that the final assessment proceedings culminated with the passing of the adjudication order dated 10.04.1986.

5. Therefore, the only issue which survives for our consideration is: whether order dated 10.04.1986 was a final assessment order. Because if it was not so, then the writ petition would have to be allowed without more, in view of the ratio of the Supreme Court judgment in the case of ITC Ltd. (supra).

6. Mr. Ravinder Narain, Advocate who appeared for the writ petitioner submitted that even though the challenge to the impugned show cause notice was on several grounds, the only ground he wished to press was that: the impugned show cause notice dated 27.01.1988 could not have been issued during pendency of the assessment proceedings.

6.1 In order to establish that show cause notice dated 10.04.1986 was not a final assessment order, he drew our attention to the following:

(i) Paragraph 13.1 (K)(at page 125 of the paper book) of the impugned show cause notice dated 27.01.1988.

(ii) The operative part of the order dated 10.04.1986.

(iii) Paragraph 5 (at page 134 of the paper book) of the order dated 28.04.1988 - which according to the writ petitioner, was in fact, the order of "final assessment" by which central excise duty demand was pegged at Rs. 80,30,20,263.55.

(iv) Paragraph 5 and 13 (at pages 138 & 142 of the paper book) of the counter affidavit filed by the respondent -Union of India, in writ petition No. 1259/1988 instituted between the same parties, in the High Court of Allahabad.

(v) Paragraph 24 (at pages 262-263 of the paper book) in the counter affidavit of the respondent - Union of India, in the instant writ petition.

7. The learned ASG, on the other hand, strenuously relied upon paragraph 46 of the adjudication order dated 10.4.1986.

8. We must confess what, according to us were issues, already covered by judgment of the Supreme Court in the case of ITC Ltd. (supra), became vexed in view of the stand taken by the Respondents. Therefore, it may be relevant to bring to fore the following brief facts, in so far they are relevant.

8.1 The writ petitioner, that is, ITC Ltd, which has its registered office in Calcutta (now Kolkata), is, amongst others, in the business of, manufacture of, excisable goods, namely cigarettes, of different brands. At the relevant point in time, cigarettes were manufactured by the writ petitioner in several factories all over the country including: Fraizer Town, Banglore, Saharanpur (U.P.) and Mungair

(Bihar). With the introduction of a new Section 4 in the Act, which was brought into force w.e.f. 01.10.1975, the writ petitioner had been submitting their price-list in the prescribed proforma-I in respect of cigarettes, manufactured by it. The writ petitioner had been claiming before the department that assessable value of cigarettes, manufactured by it, ought to be determined on the basis of ex-factory prices as charged to their wholesale dealers, with allowance for deductions on account of post-manufacturing expenses, such as, marketing and distribution expenses, advertising expenses and interest, amongst others. Since the department was not in agreement with the stand taken by the writ petitioner; the Collector of Central Excise, Bangalore, Meerut (earlier Kanpur), Patna issued several show-cause notices from time to time to the writ petitioner.

8.2 It is pertinent to note that in this writ petition, we are dealing with only that part of the adjudication order which pertains to the Collector of Meerut involving the Saharanpur factory of the writ petitioner. It is not disputed that in respect of Saharanpur factory of the writ petitioner, the Collector, at Kanpur had issued a show cause notice on 08.12.1978. This was followed by a supplementary show-cause notice dated 29.01.1979. The department, in order to avoid multiplicity of proceedings, got the Central Board of Excise and Customs to issue an order dated 10.09.1984, whereby the adjudication of show-cause notices, issued to the writ petitioner by various Collectors, was centralized for the purposes of adjudication with the Director General (Inspection) in the office of the Directorate-General of Inspection and Audit (Customs and Central Excise), New Delhi. For the purposes of adjudication, he was to act as the Collector of Central Excise.

8.3 On 13.09.1985, a corrigendum to the show cause notices dated 08.12.1978 and 29.01.1979, as mentioned above, was issued by the Collector, at Kanpur to the writ petitioner. The corrigendum, inter alia, was issued primarily on account of the fact that on 07.10.1983, the Supreme Court had pronounced its judgment in the case of Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, wherein several issues with respect to post-manufacturing expenses were decided, and a finality was lent, as to what would constitute normal price "in terms of the new Section 4(1)(a) of the Act."

8.4 Consequently, the Director General (Inspection) passed a common order dated 10.04.1986, pertaining to several other factories of the writ petitioner, including the Saharanpur Factory. The adjudication order pertained to the period 01.10.1975 to 28.02.1983. Since, this order is at the heart of the present controversy as to whether it constitutes a final assessment order, it would be apposite to extract the operative part of the order.

18.1 To sum up the discussions and findings in the preceding paragraphs,-

(a) the company and its WDs are not "related persons" within the meaning of Section 4(4)(c) of the Central Excise and Salt Act, 1944;

(b) the price(s) at which the company sold the cigarettes to its WDs was not the

sole consideration for sale;

(c) the assessable value(s) of the cigarettes has to be determined in accordance with the provisions of Rule 5 of the Central Excise (Valuation) Rules, 1975.

(d) for the purpose of determining the value under the said Rule 5-

(i) freight element (whether actual or equalized) cannot be added;

(ii) similarly, cost of CFC cannot be added;

(iii) advertisement and sales promotion expenses incurred by the WDs shall be added; and

(iv) similarly, interest including that on the security deposits made by the WDs shall be added.

(e) no deduction whatsoever on account of the supposed duty shall be made from the advertisement and sales promotion expenses and interest while adding these to the price;

(f) the company is liable for penal action under Rule 173-Q of the Central Excise Rules, 1944;

(g) principles of natural justice are not violated by not producing the witnesses for cross-examination by the company;

(h) no part of the demand is time barred.

## ORDER

19.1 Considering the above discussions and findings, I make the following order:

(a) pending provisional assessments shall be finalized by the respective proper officers and where the assessment had already been finalized, differential duty demanded, on the basis of the revised assessable value(s) of the cigarettes, keeping in view the findings above; and the company shall pay the differential duty demanded, (whether on finalization of the provisional assessments or otherwise as aforesaid; and

(b) penalty of Rs. 1,00,00,000.00 (rupees one crore only) is imposed on the company under Rule 173-Q of the Central Excise Rules, 1944. However, I do not propose to order confiscation of land, building, plant, machinery, materials, etc.

9. On 27.01.1988, the impugned show cause notices were issued for the period 27.06.1980 to 28.02.1983. According to the respondent, the said show cause notice came to be issued as they had gathered intelligence that the writ petitioner was evading the payment of appropriate excise duty by resorting to fraudulent undervaluation. On the basis of this intelligence, raids were conducted by the Director of Anti-Evasion, at various offices and factories of the writ petitioner, as well as some of its, wholesale dealers. The said raids revealed several incriminating documents. The scrutiny of the seized documents and the

investigations conducted thereafter, resulted in issuance of the aforementioned impugned show-cause notice. By this show cause notice, dated 27.01.1988, a sum of Rs. 26,43,02,733.49/- was sought to be recovered from the writ petitioner towards central excise.

10. On 28.04.1988, the Assistant Collector of Central Excise Division, Saharanpur passed an order whereby, for the period 01.10.1975 to 28.02.1983, a demand in the sum of Rs. 80,30,20,263.55/- was raised in addition to sum already paid for the aforementioned period, on the basis of the order of Director General (Inspection) dated 10.04.1986.

11. This order was assailed by the writ petitioner by filing a writ petition being, Civil Misc. Writ Petition 1259/1988. The said writ petition was filed in the High Court of Allahabad. In response to the writ petition, a counter-affidavit was filed by the respondent-Union of India. The writ petition came to be dismissed by the Allahabad High Court vide its order dated 09.08.1990. Being aggrieved, a SLP was preferred. The Supreme Court disposed of the SLP vide its order dated 28.09.1990, whereby the writ petitioners were given liberty to file an appeal with the Collector of Central Excise (Appeal), Allahabad against order dated 28.04.1988, within a period of four weeks. Accordingly, the petitioner filed the appeals impugning the order dated 28.04.1988 before the Collector of Central Excise (Appeal), Allahabad. However, these appeals were transferred to the Collector of Central Excise (Appeal), Ghaziabad. By an order dated 18.10.1994, the Collector of Central Excise (Appeals), Ghaziabad dismissed the appeals. The demand was, however, reduced from Rs. 80.30 crores (approximately) to Rs. 76 crores (approximately). We are informed that appeals against this order of the Collector were filed before the Central Excise Gold and Appellate Tribunal (in short the Tribunal). The writ petitioner succeeded in the said appeals before the Tribunal. The department's appeals, we are also informed, to the Supreme Court, were also rejected. However, as per the averments made by the writ petitioner in the proceeding before the Commissioner of Central Excise, Delhi, a preliminary issue was raised with regard to jurisdiction and maintainability of the impugned show-cause notice dated 27.01.1988. In respect of the writ petitioner's Calcutta (now Kolkata) factory, the then Collector vide its order dated 02.04.1996 dropped the proceedings. It transpires that the Collector, based on the submissions of the writ petitioner that the calculation of the differential excise duty had to be made in terms of the judgment of the Tribunal in writ petitioner's own case reported in 1994 (72) ELT 315, directed the representative of the Central Excise Department, Saharanpur to recalculate the demand.

11.1 On 11.02.1988, the Commissioner of Central Excise enclosed a copy of letter dated 06.02.1988 addressed by Assistant Commissioner to him enclosing a chart showing the recalculated differential duty. By this letter, the writ petitioner was called upon to submit its reply or submissions within 15 days of the letter. The writ petitioner has averred that by virtue of the recalculation, carried out by the Assistant Commissioner, the demand, in respect of the impugned show cause

notice dated 27.01.1988, stood reduced from Rs. 26 crores (approximately) to Rs. 4,28,85,544.42 (approximately). On 23.03.1998, the writ petitioner had issued a communication to the Commissioner of Central Excise, Delhi, inter alia, pointing out that in view of the lack of jurisdiction in the issuance of the said show cause notice, further proceedings with regard to examination and cross-examination of witnesses need not be continued with. A reference was also made in respect of the fact that based on this preliminary issue, the predecessor of the Commissioner of Central Excise had dropped notices relating to another factory of the writ petitioner located at Kidderpore. Amongst other averments, it was also averred in the said communication that the issues and the period raised referred to in the impugned show-cause notice was covered by the decision of the Tribunal in appeal No. E/1505-09/92-A. The sum and substance of the submission was that this issue in the impugned show-cause notice need not be reopened and reagitated. The Commissioner of Central Excise (Delhi), however, in response to the writ petitioner's letter dated 23.03.1998, intimated to the writ petitioner that he intended to continue with the proceedings, that is, the cross-examination of witnesses.

12. Being aggrieved, the writ petitioner filed the instant petition in this Court. The petition was moved on 27.04.1998. A division Bench of this Court issued notice to the respondent, and granted an ad-interim order whereby, the cross-examination of the witnesses was allowed to continue with a caveat that the proceedings thereafter, shall remain stayed till the next date of hearing. After several dates, as indicated hereinabove, the order dated 12.05.2000 was passed by the Division Bench referring the matter to a larger Bench.

12.1 It is pertinent to note that on 28.07.2000, the matter was adjourned sine die by the then Constituted Full Bench to await the decision of the Supreme Court in the writ petitioner's own case in respect of judgment of the Tribunal (Chennai Bench) pending before it. The parties, as was noted in the order, had agreed to inform the court as regards disposal of the matter by the Supreme Court so that the Full Bench could be constituted. We may only note that the parties, thereafter, did not make any effort to inform this Court, as regards the disposal of the matter by the Supreme Court. The registry of this Court discovered that the Supreme Court had disposed of the appeal against the Tribunal's order (Chennai Bench), on 06.03.2003. This discovery, however, was made by the registry on its own initiative only in August, 2009 whereupon the present Full Bench was re-constituted. We may only observe that we expect more alacrity from counsels. It is these small but significant steps, if taken promptly by lawyers of both sides, that would enable this Court to deal effectively with the burden of pendency.

12.2 From the narration of facts and circumstances, set out hereinabove, it is without doubt established that order dated 10.04.1986 is not an assessment order, much less a final assessment order. Our reasons for coming to this conclusion are as follows:

12.3 The order dated 10.04.1986 categorically refers to the fact that after the said show-cause notices were issued for the period 01.10.1975 to 28.02.1983, and the total excise duty, which, according to the department was payable by the writ petitioner, was in the sum of Rs. 5,24,31,23,735.87/-. Against this, on the department's own showing, the writ petitioner had paid a sum of Rs. 4,21,01,94,370.44/-. Therefore, vide show cause notice dated 08.12.1978 and supplementary show-cause notice dated 29.01.1979, as corrected by show cause notice dated 13.09.1985, the differential duty, which the writ petitioner was called upon to pay, was in the sum of Rs. 1,03,29,29,365.43/-. The said show-cause notices were obviously issued in response to the deductions claimed by the writ petitioner in their price list filed for the period 01.10.1975 to 28.02.1983. The department had obviously come to a provisional figure of duty in the sum of Rs. 1,03,29,29,365.43/- , based on stand that the post-manufacturing expenses, which were claimed as deduction by the writ petitioner, were required to be disallowed in calculation of the assessable value of cigarettes, manufactured by the assessee, by adding the said post-manufacturing expenses to ex-factory price.

12.4 Upon adjudication, the Director General (Inspection) by his order dated 10.04.1986, crystallized the principles, based on which the assessable value had to be determined, in respect of cigarettes, manufactured by the writ petitioner, having regard to the then prevailing provisions of Rule 5 of Central Excise (Valuation) Rules, 1975. It cannot be disputed that the final assessment, in respect of at least, the Saharanpur factory, with which we are concerned in the present petition, got settled only by virtue of order dated 28.04.1988. A plain reading of the order dated 28.04.1988 demonstrates that it relates to clearances made by the writ petitioner during the period 01.10.1975 to 28.02.1983; made in respect of, cigarettes manufactured by the writ petitioner by its Saharanpur factory. The principles, on the basis of which the assessment was concluded, was undoubtedly the order of the Director General (Inspection) dated 10.04.1986. A bare reading of paragraphs 4 & 5 of the order dated 28.04.1988 makes that amply clear. Being relevant the same are extracted hereinbelow:

4. Accordingly, in the light of D.G. Audit & Inspection, New Delhi's order No. 1/1986, Dt. 10.04.1986, differential duty on the revised "assessable value" has been worked out, as shown in the attached charts. A consolidated chart, showing the quantum of duty paid, actual amount of duty payable consequent upon revision of assessable value and differential duty to be paid by the party is also enclosed. As per this consolidated chart, M/s I.T.C. Ltd., Saharanpur are required to pay differential duty to the tune of Rs. 80,30,20,263.55/- in addition to the duty already paid on the goods cleared from Oct. 1975 to Feb., 1983 as per details shown in the charts attached.

5. All the previous provisional assessments made, after payment of the aforesaid amount of Rs. 80,30,20,263.55/- , being differential duty, may be treated as finally settled.

12.5 In our view, therefore, the show cause notices of 08.12.1978 and 29.01.1979, as corrected by show cause notice dated 13.09.1985, culminated into a final assessment, and consequently, a final demand only by virtue of order dated 28.04.1988. In the show cause notice a provisional demand in the sum of Rs. 103 crores (approximately) was made, which, upon finalisation of the assessment, got reduced to Rs. 80.30 crores (approximately).

12.6 The submission of the learned ASG that the order of the Director General (Inspection) dated 10.04.1986 was itself an order of final assessment, is thus, in our view, without merit.

12.7 Great stress was laid by the learned ASG on paragraph 46 of the order dated 10.04.1986 in which the following extract of the show cause notice is found:

...accordingly ITC Ltd., Saharanpur are required to show cause as to why central excise duty, amounting to Rs. 1,03,29,29,365.43/- , short-paid by them during the period from 01.10.1975 to 28.02.1983 should not be demanded from them (by finalizing the provisional assessments on the principles discussed above) u/s 11A of the Central Excise and Salt Act, 1944....

12.8 Based on the above extract, it was submitted by the learned ASG that the assessments had already been finalized and what was done thereafter was only a mathematical computation. In our view, this submission is untenable for more than one reason.

(i) We have yet to see a show cause notice in a revenue matter, in which a provisional demand is not raised by the department. The extract, referred by the learned ASG, is only one such instance.

(ii) The bracketed portion of the extract which reads as:

...(by finalizing the provisional assessments on the principles discussed above)...itself shows that the figure of Rs. 103 crores (approximately) was "provisional" which was to be finalized only after the same was adjudicated upon, and thereafter crystallized into a demand.

(iii) It is not disputed by the respondent, as it cannot do so, that the order dated 28.04.1988 was passed in respect of writ "petitioners" factory at Saharanpur with regard to clearances of cigarettes, made during the period 01.10.1975 to 23.02.1983; and that the differential central excise duty, which was demanded from the writ petitioners, got reduced to a sum of Rs. 80.30 crores (approximately).

(iv) The submission of the learned ASJ, in our view, perhaps would have applied to a situation where, in the absence of any response by the assessee to the show cause notices issued by the revenue; the revenue without more treats that, as the order of assessment. Even in that situation in our view ordinarily, a formal order of assessment would have to be passed. (v) In our view, the process of

assessment would involve not only the ascertainment of the basis on which the duty is to be calculated, but also the determination of the final amount. In our opinion, assessment is an "integrated process". The assessee is as interested in knowing the basis; as he is in the determination of final liability, which he is mulcted with by the department.

(v)(a) A somewhat identical issue arose in the case of Kalyan kumar Ray Vs. Commissioner of Income Tax, West Bengal-IV, Calcutta, The Supreme Court was called upon to decide as to what would constitute an assessment order. The income tax officer in the said case, had determined the basis on which tax had to be computed on one sheet of paper, while the calculation with regard to the exact liability was left to the office; which after due scrutiny was signed by the income tax officer. The Supreme Court in that context observed as follows:

...assessment is one integrated process involving not only the assessment of total income but also determination of tax. The latter is as crucial for the assessee as the former.... If, therefore, the income tax officer first draws up an order assessing the total income and indicating the adjustments to be made, directs the office to compute the tax payable on that basis and then approves of it, either immediately or some time later, no fault can be found with the process, though it is only when both the computation sheets are signed or initialed by the income tax officer that the process described in Section 143(3) will be complete. The concept of "assessment" for the purposes of excise has also to be understood likewise.

(v)(b) A perusal of Sub-paragraphs (c), (d) & (e) of paragraph 18.1 of order dated 10.04.1986 (extracted in an earlier part of our judgment) clearly demonstrates the point various elements of cost had to be added or subtracted in order to arrive at the assessable value of cigarettes. To cite an instance the said paragraph alludes to the fact that the advertisement and sales promotion expenses incurred by wholesale dealers, which were to be added, were not known at that stage.

(vi) The provisions of Rule 9B(5) of the Central Excise Rules, 1984 make the position quite clear. The said rule reads as follows:

Rule 9B. Provisional assessment to duty - (1) Notwithstanding anything contained in these rules,-

(a) xxxx

(b) xxxx

(c) xxxx

(2) omitted

(3) xxxx

(4) xxxx

(5) When the duty leviable on the goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short (short) of, or is in excess of, the duty finally assessed, the assessee, shall pay the deficiency or be entitled to a refund as the case may be.

(vi)(a) A bare reading of Sub-rule (5) of Rule 9B would show that in order to calculate; the differential duty to be paid by the assessee or the assessee's entitlement to refund, the duty, which is assessed provisionally, is required to be adjusted against duty finally assessed. There is, therefore, no final assessment till such time there is an adjustment, as mentioned above.

(vii) There is another reason which persuades us to hold in favour of the writ petitioner. The reason being: the provisions of Section 11A get triggered only upon a final assessment of duty. It is so because, a bare reading of the provisions of Section 11A of the Act would show that the "relevant date" for commencement of limitation begins from the date on which the excise duty, which is provisionally assessed, is adjusted against final assessment. This is quite clear if regard is had to the provisions of Section 11A(3)(ii)(b). The same being relevant is extracted hereinbelow:

11 A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.

(1) xxxx

(2) xxxx

(3) xxxx

(i) xxxx

(ii) relevant date" means: (a) xxxx

(A) xxxx

(B) xxxx

(C) xxxx

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

13. In view of our discussions above, both questions are answered in favour of the writ petitioner. The respondent could not have issued the impugned show cause notice dated 27.01.1988, without having finalised the assessment proceedings. As discussed above, the provisions of Section 11A get triggered only upon completion of the final assessment proceedings. In the instant case, at a point in time when the show cause notice dated 27.01.1988 was issued the assessment proceedings were undoubtedly incomplete. They were provisional.

The final assessment proceedings got finalized only on 28.04.1988. The order of the Director General (Inspection) dated 10.04.1986, in our view, was not a final assessment order, as contended by the respondent.

14. The other issue posed to us is with regard to applicability of the judgment of the Supreme Court in the case of Serai Kella (supra). The issue, which arose in Serai Kella (supra) was whether the order of the Tribunal passed pursuant to the directions of the High Court, whereby it had quashed the provisional assessment made by the Revenue, with a direction that a fresh assessment be made in terms of the guidelines given by it, was erroneous, in view of absence of a show-cause notice u/s 11A of the Act. The Supreme Court came to the conclusion that where the assessee was clearing the goods on the basis of self-assessment procedure, the assessment was only provisional, which would have to be set off against duty finally assessed by a proper officer. In both instances, where duty was payable, or a credit was available to the assessee; a result could be attained through the necessary debit or credit in the account "current", maintained by the assessee, within the prescribed period of 10 days. (See observations in paragraph 16). It is in these circumstances that the Supreme Court came to the conclusion that, at that stage, the provisions of Section 11A were not applicable. Consequently, in paragraph 17 & 18 of its judgment, the Supreme Court observed that Section 11A of the Act come into play only after the final assessment, and the limitation in that respect would commence from the date of the final assessment. The Supreme Court in the subsequent judgment, that is, in the petitioner's own case in ITC Limited, has noticed the observations in Serai Kella (supra) in paragraph 24. The Supreme Court in paragraph 24 of ITC Ltd. (supra) has as a matter of fact taken recourse to the observations made in paragraph 17 & 18 in Serai Kella (supra). In view of the Supreme Court's own view in ITC Ltd. (supra) as regards the ratio of Serai Kella (supra), the answer of the second question is also in favour of the writ petitioner.

15. Accordingly, the writ petition is allowed in terms of prayer "B". The show cause notice dated 27.01.1988, as also letter dated 13.04.1988 being enclosures "B" & "J" to the writ petition are quashed.