

(2000) 06 MP CK 0042

In the Madhya Pradesh High Court

Case No : Writ Petition No's. 1232 and 1233 of 1999

Procter and Gamble Home Products Ltd.

APPELLANT

Vs

C.C. and C. Ex.

RESPONDENT

Date of Decision : 10-06-2000

Acts Referred:

Central Excise (Valuation) Rules, 1975 — Rule 10, 7
Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 20, 4, 4(1)
Constitution of India, 1950 — Article 226, 227

Citation : (2001) 128 ELT 330 : (2001) 1 MPJR 191

Hon'ble Judges : Dipak Misra, J

Bench : Single Bench

Advocate : A.M. Mathur, for the Appellant; Indira Nair, for the Respondent

Judgement

Dipak Misra, J.

The factual matrix, the questions raised, the points of law urged and the relief claimed being interlinked, both the writ petitions were heard analogously and are disposed of by this common order. For the sake of convenience and clarity the factual matrix in each of the writ petition shall be separately dealt with. As the counsel for the parties addressed this Court in Writ Petition No. 1233/99 at length, I will advert; to the factual backdrop of the said writ petition first.

Before uncurtaining the factual backdrop it is worthwhile to mention that invoking extraordinary jurisdiction of this Court under Article 226 of the Constitution of India the petitioner in Writ Petition No. 1233/99 has prayed for quashment of the show cause notice, Annexure P-2 dated, 23-12-1998 passed by the Commissioner of Customs and Excise, the sole respondent.

The facts as have been unfolded are that the petitioner Company is a limited Company under the provisions of the Companies Act, 1956. Its registered office is situated at Bombay and it has a manufacturing factory at Mandideep, Raisen. It is engaged in Manufacturing of detergent powder under the name Ariel falling

under Chapter heading 3402.90 of Central Excise Tariff Act, 1985. Ariel was being manufactured and marketed by the petitioner Company, namely, Procter and Gamble India Ltd. (hereinafter referred to as "PGIL") till 31-10-1993. Thereafter it is being marketed by another Company called Procter and Gamble Home Products Limited (hereinafter referred to as "PGHP"). In the month of November, 1993 PGIL divested the business of Ariel Detergent Powder comprising of Ariel Blue and Ariel Green in favour of the PGHP for a consideration of Rs. 17.8 crores. The PGIL informed the Central Excise Authorities about the divestiture of its business vide letter dated 5-1-1994 along with the price list. In the said list PGIL has specifically mentioned that from November 1, 1993 Ariel is being sold to PGHP and that Mr. D.A. Thomas and Mr. S. Bhattacharya are also Directors of PGHP Ltd. It was also mentioned there: n that the Ariel was sold to the stockist through Depot all over the country but consequent to the transfer of marketing and distribution to PGHP Ltd. effective from November 1, 1993, the entire production of Ariel would be sold to PGHP Ltd.

According to the petitioner after the Superintendent, Customs and Central Excise, Zone-II, Bhopal issued a show cause notice to PGIL regarding price list No. 43 dated 3-1-1994. In the show cause notice it was mentioned as under :-

"You have shown in para Nos. 2 and 14 of question naire that, from Nov. 1, 1993 the entire production of Ariel is being sold to PC HP Ltd. Being a mutual interest between these two companies i.e. P & G India Limited and PGHP limited, it appears that M/s. PGHP is your related person. Further you have not submitted a copy of agreement entered into by you with PGHP Ltd. for verification to this office."

The petitioner vide its letter dated 11-1-1994 clarified that it has transferred the marketing and distribution of Ariel Vicro System to another Company PGHP w.e.f. 1-11-1993 and consequently the entire production of Ariel Micro System manufactured by the petitioners being sold to PGHP. It was also pointed out that PGHP is not a related person to the petitioner within the meaning of Section 4 of the Central Excise Act, 1944. It was also pointed out that PGIL and PGHP do not have mutuality of interest in the business of each other. It was highlighted that majority of shares of PGIL are held by Richardson Vicks Inc. USA and the majority of shares of the PGHP are held by Proctor & Gamble India Holding Inc. USA. Thus, as averred, the petitioner clarified and submitted the price list in Part-I and that of Part IV is not the appropriate part for declaring the assessable value. A copy of the said reply has been brought on record as Annexure F-6. The Superintendent, Central Excise, Range-I, issued a letter, dated 25-4-1994 asking the petitioner to submit a copy of the agreement entered into between the petitioner and PGHP. In accordance with the direction made in the letter the petitioner submitted the copy of the Agreement vide their letter dated 2-5-1994. The Superintendent (Central Excise Range-I, Mandideep) issued a letter dated 4-2-1995 enquiring as to the reason in decrease of the assessable value despite the decrease in cost of inputs used in the manufactured of Ariel Micro System,

Detergent Powder manufactured by PGIL. After receipt of the said letter PGIL submitted its reply stating that w.e.f. 1-11-1993 there has been change in the marketing and distribution pattern of Ariel Micro System Detergent powder and PGIL has transferred the marketing and distribution of Ariel to PGHP. It was also pointed out that the Agreement between PGIL and PGHP had already been filed vide letter dated 2-5-1994. As averred in the petition, on 26th and 27th April, 1995 Central Excise Audit was conducted by the Internal Audit Team of the Collectorate, Indore and the Audit party raised certain queries. These queries were replied to by the PGIL wherein the names of Directors of Richardson Vicks Inc. USA were submitted along with other replies. The Superintendent (Preventive) along with his team visited the Factory premises of PGIL on 26-8-1995, checked the records maintained by PGIL at the factory and seized certain records and stocks. The Central Excise Officers made certain queries which were replied to by the PGIL by letter dated 30-8-1995 and in the said reply PGIL submitted the relationship between them and PGHP as also share holding pattern of PGIL, PGHP, Richardson Vicks Inc. USA, and Proctor and Gamble Company, USA. It was mentioned that PGIL is not the related person to PGHP. It is pleaded in the writ petition that since January, 1994 the Central Excise Department was investigating the relationship between the PGHP and PGIL and they had fully applied their mind about the relationship between the two companies. The entire facts about the relationship were clearly submitted and were known to the Central Excise Department. As put forth in the writ petition the Superintendent (Preventive) Central Excise, Bhopal again issued summons to PGIL in respect of stocks seized on 26-8-1995. PGIL submitted their further submissions regarding the queries made by the Superintendent (Preventive) vide letter dated 11-9-1995. A team of officers of Audit Branch including the Assistant Commissioner, visited the factory premises of PGIL and checked the records maintained by PGIL, They made certain queries which were replied to by the PGIL vide letter dated 20-3-1997. The Superintendent (Audit) had asked the petitioner to furnish certain information regarding divesting of detergent business to the PGHP. The required information was sent by letter dated 30-6-1997 by the PGIL. The Superintendent (Preventive), Customs & Central Excise again issued summons dated 10-3-1998 requiring PGIL to appear on 17-3-1998 to furnish certain informations. In pursuance of the said notice the PGIL submitted its reply specifically mentioning that all the information called for had already been submitted by it from time to time. It is pertinent to state here that thereafter also correspondences went on between the Authority and Company in respect of certain aspects. The department wanted the petitioner to submit a statement of facts on divestiture of business which was submitted by PGIL.

It is averred in the writ petition that the facts would clearly reveal that sale of Ariel Detergent Powder by the petitioner to PGHP under an Agreement effective from 1-11-1993 was well within the knowledge of the Central Excise Department right from 11-1-1994. It is also put forth that the relationship of the petitioner with PGHP was also within the knowledge of the Central Excise Department. It

was also in the knowledge of the Department that the trade mark and brand name of Ariel Detergent Powder belongs to Procter & Gamble, USA and the PGHP are licencees to use the above brand name. It is averred in the writ petition that the product label and packing material used in packing the Ariel detergent powder was also well within the knowledge of the Department and it also knew that two of the Directors including Managing Director and whole time Director of the petitioner Company are also Directors in PGHP. It was also in the knowledge of the department that the majority of shareholders of the petitioner company in M/s. Richardson Vicks Inc. USA and Richardson Vicks is a subsidiary of Procter & Gamble, USA. It is asserted that all the above facts were within the knowledge of the Central Excise Department by 30-8-1995.

While the matter stood thus, the Centnl Excise Department issued a show cause notice No. 17530 dated 23-12-1998 of PGIL alleging that they are the manufacturer of marketing of Ariel Detergent Powder and they had made short payment of Central Excise duty amounting to Rs. 25,53,91,961/- for the period December 93 to September 1997. It was alleged in the said show cause notice that PGIL is the agent of PGHP. While a show cause notice was issued to PGIL the department issued a show cause notice No. 17533 dated 23-12-1998 to the PGHP alleging the they are engaged in manufacture and sale of goods through a related person known as PGIL and the value of the goods ordinarily will be the price at which the PGHP sold the goods in whole sale market and not the price charged by the PGIL from PGHP. A copy of the show cause notice has been Drought on record as Annexure P.2. The said notice to show cause is the cause of grievance of the petitioner.

In the grounds mentioned in the writ petition it has been put forth that the Commissioner has no jurisdiction to issue a notice to show cause of this nature as limit for issuing show cause notice is six months u/s 11A of the Central Excise Act (hereinafter referred to as "the Act") and if the Central Excise duty is evaded by collusion, mis-statement or suppression of facts the time limit is 5 years but in the present case the department has not made out a case of mis-representation, collusion or suppression of facts as all the materials were available" before the Department by 1995 and hence, the extended period of limitation is not available to the Commissioner. It is also put forth that mere non-payment of duty would not attract the proviso to Section 11A of the Act. It is highlighted in the writ petition that the entire show cause notice dated 23-12-1998 is based on the agreement dated 19-11-1993 and the department was aware that PGIL was selling the goods to PGHP which cannot be treated as a related person to PGIL within the meaning of Section 4 of the Central Excise Act. It is also urged that the show cause is vague with regard to mis-statement and suppression of facts and in absence of mention of particular facts and circumstances the notice to show cause is unwarranted and liable to be lanced in exercise of jurisdiction under Article 226 of the Constitution.

A counter affidavit has been filed by the sole respondent contending, inter alia,

that the Commissioner has jurisdiction over the petitioner's factory as it is situated at Mandideep District, Raisen which falls under the jurisdiction of the respondent. In the return it has been highlighted that the averment that the agreement of the petitioner with PGHP dated 19-11-1993 was submitted and scrutinised by the Central Excise Department in the year 1993 and 1994 itself and, therefore, after a period of five years the department cannot issue a show cause notice is totally erroneous and misleading. It has also been stated in the return that the non-compete agreement and licence of Ariel business were received by the department on 8-7-1997. In this connection reference has been made to Annexure P.16 of the petition. It has been put forth that at no point of time the petitioners had submitted all the agreements together but submitted in piecemeal over a long period of time during which the officers handling the case were transferred and new officers came to handle the case. A reference has been made to Annexure P 16 which clearly admits that the Company had submitted the agreements on 2-5-1994 and 30-8-1995 and had submitted the non compete agreement and licence of Ariel business on 30-6-1997. Further some new facts had been submitted by the petitioner regarding non-competition fee and licence on Ariel business amounting to Rs. 12.80 crores as disclosed by them on 30-6-1997 and many other important information were given having revenue implication. It is stated in the return that in view of the additional facts that came to the knowledge of the department the show cause notice was issued. It is also putforth that the petitioner has not exhausted the alternative remedy available to them and directly approached this court challenging the show cause. It is put forth that in writ jurisdiction show cause notice issued by invoking extended period of limitation is not quashable at the threshold. It is further contended that the Commissioner has not usurped, the jurisdiction by issuing the notice to show cause as he has acted within the power u/s 11A of the Act. The department has pointed out that the petitioner had filed a mis-statement and suppressed the true and correct assessable value inasmuch as it had submitted the facts pertaining to the depot price during December 1993 to September 1997 which had been taken into consideration for the determination of actual duty payable from M/s. PGIL to the department and also suppressed the collection of extra consideration from M/s. PGHP (the only buyer and owner of the Brand) with intention to evade payment of duty and, therefore, the proviso to Section 11A(1) was invoked. In defence of show cause it has been asseverated that as the petitioner has resorted to mis-statement and suppression of the facts and there has been loss of revenue to the Government, the show cause notice had been issued. It is clarified in the return that the show cause notice has been issued to Proctor & Gamble India Ltd. Mandideep for differential duty and another show cause notice has been issued to PGHP treating them as a manufacturer and the same has been done by abundant precaution. In the return the department has admitted that duty cannot be demanded twice on same goods and it is not the intention of the department to demand duty on the same goods from two companies. It is further highlighted that the positive mis-statement by the petitioner has to be understood by appreciating the background. It is averred

that M/s. Procter & Gamble, USA, Cincinnati is owning two chains of subsidiaries. The chain one is Richardson Vicks, USA which is a subsidiary of the former. This subsidiary is having 65% share holding in Procter & Gamble Ltd. Another chain consisting of Procter and Gamble Holding Inc. USA, which is a subsidiary of the parent Company i.e. P & G Company Ltd., USA. This subsidiary company is having 100% share holding in PGHP Ltd. It is further put forth that PGHP Ltd. was previously known as "Personal Care Products Ltd." During the meeting of the Board of Directors of M/s. PGIL at Bombay the proposal of transferring maximum business of the Ariel brand was taken. The relevant contents of the minute has been reproduced in the counter affidavit. By narrating all these the stand taken in the return is that PGHP is a related person to PGIL and there has been suppression of this relationship by the petitioner by mis-stating that the transactions were on principal to principal basis. The legal relationship between the two companies was suppressed by the petitioner and hence, the extended period of limitation is attracted in this case.

In the counter affidavit it has also been pointedly stated that as per the non-compete agreement the PGIL agreed with PGHP that during the period in question PGIL shall not without their prior written consent, directly or indirectly own, manage, operate, join have an interest in, control or participate in the ownership connected in any manner with, any body corporate, partnership, proprietorship, trust estate, association or other business entity which directly or indirectly engages as a commercial activity in India. The agreement further stipulates PGHP engages PGIL to manufacture and supply to PGHP compact synthetic Detergent from its factory at Mandideep as per the provisions of the Manufacturing Agreement entered into between the parties. The department has asserted that this arrangement clearly sets forth that the PGHP's role is that of sole selling agent wherein PGIL is the principal. Thus, the tenor of the agreement makes it clear that though there is mention of principal to principal basis yet it amounts to arrangement of a sole distributor. It is put forth that the language of the contract does not reveal the real position as the facts clearly show that PGHP continues to be the sole selling agent. Thus there has been mis-statement of facts relating to the relationship and the transactions concerned. With these averments the issuance of notices to show cause has been justified.

I have heard Mr. A.M. Mathur, learned senior counsel along with Mr. S. Agarwal, learned Counsel for the petitioner and Mrs. I. Nair learned Counsel for the respondent.

Mr. Mathur has raised the following contentions.

(i) There is no legal foundation for the issuance of the show cause notice and in absence of foundation it is without jurisdiction.

(ii) Proviso to Section 11A(1) is an exception and must be construed strictly. The initial burden is on the department to prove the applicability of the provision and something more positive than a mere failure to pay the duty is necessary to

invoke the jurisdiction under the said provision.

(iii) It must be specifically stated in the show cause notice as to which allegations against the assessee are falling within the four corners of the proviso to Section 11A(1) of the Act and in absence of that the show cause notice is invalid.

(iv) For invoking proviso to Section 11A(1) of the Act something positive than mere inaction or failure on the part of the manufacturer or producer highlighting that there has been conscious, deliberate withholding of information.

(v) The show cause notice must reflect about the omissions or commissions to get the benefit of the extended period of limitation. That apart the assessee must be apprised of the allegations made against him. A bare statement about mis-statement and suppression of facts would not meet the requirement of law in absence of specific allegations.

(vi) The show cause notice is absolutely vague as it does not disclose any mis-statement or suppression of fact which has been made by the petitioner.

(vii) The factual matrix will show that there is a change of opinion and that does not entitle the Authority to take re-course to the proviso to Section 11A(1) of the Act.

(viii) A quasi-judicial authority by deciding a jurisdictional fact in an erroneous manner cannot confer jurisdiction on itself.

(ix) A show cause notice must be read as it is and nothing can be added to it by the department and the department cannot travel beyond the show cause notice.

(x) The plea of the department that there is an alternative remedy does not create a bar for exercise of jurisdiction of this court, more so, when the show cause notice has been issued without any foundation.

(xi) The entire show cause notice is based on the agreement dated 19-11-1993 effective from 1-11-1993 and this agreement as well as all the conditions of the agreement were known to the department by 2-5-1994 and, therefore, they cannot take recourse to the extended period of limitation to initiate a proceeding against the petitioner.

(xii) There can be only one manufacturer of goods and not two and, therefore, notice issued to PGIL and PGHP describing both the companies as manufacturers clearly exposes the non-application of mind of the Commissioner and that makes the show cause notices vulnerable in the eye of law.

Mrs. Indira Nair, learned Counsel for the respondent raised the following submissions:

(a) The show cause notice is clear, unambiguous and based on facts and, therefore, does not warrant interference in exercise of extraordinary jurisdiction under Article 226 of the Constitution. The agreement between the PGIL and PGHP would clearly show that PGHP has direct control over the products of PGIL

and PGIL cannot sell to anybody except PGHP and, therefore, the sale is not on principal to principal basis. The licence and the non-compete agreement, and the details of their relationship were given to the department on 30-6-1997 as is apparent from Annexure. P. 16 and hence, the show cause notice is within time. The PGIL submitted a list of names of directors which are common to both PGIL and PGHP and this information was revealed when a raid was conducted during the year 1998. That apart, the petitioner had given the price list by which the goods are sold by PGIL to PGHP and the rate at which the PGHP sells the goods to other agents all over the country. All these go to prove that the relationship between the two companies is quite different. The queries made from time to time had revealed that PGHP is a related person to PGIL as per Section 4(iv)(c) of the Act.

(b) The department obtained full knowledge after the raid was conducted during 1998. It was discovered at that time the petitioner used to sell their excisable goods to PGHP at a lower price and, thereafter adding all their excisable value PGHP used to sell the goods at a very high rate to various other agents. A perusal of the price list submitted by the petitioner will clearly show how much duty has been evaded by suppressing the real fact of relationship between PGIL and PGHP. It is quite pertinent to mention that the price list was submitted only on 25-11-1998 and this document has been referred to in the show cause. Thus, there has been mis-statement and suppression of facts regarding the real relationship between PGIL and PGHP. Hence the Authority's action in issuing the show cause notice is justified.

(c) The PGIL by letter dated 30-8-1995 informed that the Company transferred the loss in making detergent business to PGHP w.e.f. 1-11-1993. The share holder pattern was disclosed fully by this letter to the department. But PGIL never submitted the whole facts before the department and they had supplied the material facts on piecemeal at different stages. The manufacturing agreement was produced on 2nd May 1994, the non-compete licence agreement was given on 30-6-1997, the relationship and share holding pattern was given on 30-15-1995 and price list was given sometime during June, 1997. Thus the department came to know of the entire scenario after a long lapse of time, and accordingly issued the notice to show cause.

(d) The facts pleaded by the petitioner and the reply given by the respondent indicate a complex factual matrix and it is not a case where at a glance it can be said that the show cause notice is palpably erroneous and not justifiable. In absence of this, the High Court in exercise of jurisdiction under Article 226 should not interfere.

(e) The department has the responsibility to lift the veil or pierce through the veil to find out the real relationship between the two companies. The petitioner Company had given an impression to the department that the transaction was principal to principal basis but as an actual fact when everything got revealed it came to be known that PGHP is the agent of PGIL. In the case at hand the

majority of directors of both the companies are common, and therefore, it can be presumed that they have common interest in the business and PGHP is a related person to PGIL. It becomes more apparent as PGIL is under-quoting the Central Excise in order to make the profit through other company by which procedure the actual central excise duty is not collected.

(f) The factual matrix if appreciated in proper perspective would clearly exposit that the relationship between the PGIL and PGHP is not ordinary or normal but a related one inasmuch as PGIL is completely under the control of PGHP, as the excisable goods are manufactured under the direction of PGHP and PGIL has no liberty to sell the goods to any other person other than PGHP. That apart, manufactured goods are removed from PGIL (Bhopal Office) by adding only the manufacturing price and that huge investment is done by PGHP with PGIL. Because of the special relationship PGIL is reduced to a job worker under specified conditions of PGHP. Further the Directors of the Company are common and they share a common premises.

(g) Though the show cause notices have been issued to both the companies the department has no intention to realise the duty, from both the companies.

Though numerous submissions have been advanced by the learned Counsel for the parties on merits, I will first take up the point of alternative remedy : whether the present case warrants interference by this Court under Article 226 of the Constitution or it is appropriate to ask the petitioners to file their show cause before the Commissioner and raise all the contentions and further go through the statutory remedies.

To appreciate the rival submissions raised at the Bar it is apposite to refer to Section 11A(1) of the Central Excise Act, 1944. It reads as under :-

"11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. - (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this Sub-Section shall have effect, as if for the words

"Central Excise Officer", the words "Collector of Excise", and for the words "six months", the words "five years" were substituted.

Explanation - Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be."

Mr. Mathur, learned Counsel for the petitioner, has cited number of decisions to highlight that unless something more is there mere failure to pay would not attract the proviso to Section 11A(1) of the Act. In the case of Tamil Nadu Housing Board Vs. Collector of Central Excise, Madras and Another, the Apex Court held as under :-

"A bare reading of the proviso indicates that it is in nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualised by the proviso by using such strong expression as fraud, collusion etc. and on the other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power. Since the proviso extends the period of limitation from six months to five years, it has to be construed strictly, the initial burden is on the Department to prove that the situations visualised by the proviso existed. But once the Department is able to bring on record material to show that the appellant was guilty of any those situations which are visualised by the Section, the burden shifts and then applicability of the proviso has to be construed liberally. When the law requires an intent to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word "evade" in the context means defeating the provision of law of paying duty. It is made more stringent by use of word "intent". In other words the assessee must deliberately avoid payment of duty which is payable in accordance with law...."

Learned counsel has drawn the attention of this Court to the law laid down in the case of Collector of Central Excise Vs. H.M.M. Limited, wherein their Lordships ruled thus :-

"2... Now in order to attract the proviso it must be shown that the excise duty escaped payment by reason of fraud, collusion or wilful mis-statement or suppression of fact or contravention of any provision of the Act or of the Rules made thereunder with intent to evade payment of duty. In that case the period of six months would stand extended to 5 years as provided by the said proviso...."

Their Lordship proceeded further to lay down as under :-

"If the Department proposes to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the excise department places reliance on the proviso it must be specifically stated in the

show cause notice which is the allegation against the assessee falling within the four corners of the said proviso...."

In the case of" Kaur & Singh v. Collector of Central Excise, New Delhi 1997 (94) E.L.T. 289 (S.C.) the Apex Court following the decision laid in the case of H.M.M. Limited (supra) ruled thus :-

"3. This court has held that the party to whom a show cause notice of this kind is issued must be made aware of the allegation against it. This is a requirement of natural justice. Unless the assessee is put to such notice, he has no opportunity to meet the case against him. This is all the more so when a larger period of limitation can be invoked on a variety of grounds, which ground is alleged against the assessee must be made known to him, and there is no scope for assuming that the ground is implicit in the issuance of the show cause notice."

In the aforesaid case as the show cause notice did not set out any particulars in respect of fraud or collusion or wilful mis-statement or suppression of fact or contravention with intention to evade payment of excise duty the Apex Court allowed the appeal.

In the case of Jayant Vitamins Limited Vs. Union of India (UOI), a Division Bench of this Court held that instances of mis-statement or suppression must find place in the show cause notice. The Court also took note of the fact about the bona fide belief of the assessee.

In the case of Raj Bahadur Narain Singh Sugar M. Ltd. Vs. Union of India (UOI) and Others, their Lordships laid down as under :-

"9....It has been said there with reference to Section 11A of the Central Excises and Salt Act, 1944, which replaced Rule 10, that if the authorities propose to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions and omissions stated in the proviso is committed to extend the period from six months to five years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the authorities. The defaults enumerated in the proviso were more than one and if the authorities placed reliance on the proviso, it had to be specifically stated in the show cause notice which was the allegation against the assessee falling within the four corners of the said proviso."

In the said case as the notice failed to refer to any cause of commission or omission enumerated in the relevant proviso to Rule 10, the notice given more than six months after the date of the order of refund was held to be time barred.

The learned senior Counsel for the petitioner has highlighted that deliberate withholding of information is necessary for attracting the proviso to Section 11A. To buttress the aforesaid submission he has placed reliance on two decisions, namely, Collector of Central Excise, Hyderabad Vs. Chemphar Drugs and Liniments, Hyderabad, and Lubri-Chem Industries Ltd. Vs. Collector of Central Excise, Bombay, In the first case the Apex Court held as under :-

"8.... In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to Sub-section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade the payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful mis-statement or suppression or contravention of any provision of any Act is a question of fact depending upon the facts and circumstances of a particular case...."

Similar view has been taken in the case of Lubri-chem Industries Ltd. (supra) wherein their Lordships have followed the ratio of Chemphar Drugs & Liniments (supra). The learned senior counsel for the petitioner has also drawn the attention of this Court to the case of Padmini Products Vs. Collector of Central Excise, Bangalore, wherein the Apex Court held that suppression of facts is not failure to disclose the legal consequences of a certain provision.

On behalf of the petitioner reliance has also been placed on certain decisions to pyramid the argument that show cause notice must be limited to the case made out therein and the department cannot support the show cause notice subsequently either by stating new facts or producing new documents or filing additional affidavits in support of the return. In this context, Mr. Mathur, learned senior Counsel for the petitioner, has cited the decisions rendered in the cases of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , M.A. Jackson v. Collector of Customs JT 1997 (6) SC 1 and GTC Industries Limited Vs. Collector of Central Excise, New Delhi, . In the case of M.A. Jackson (supra) a notice to show cause was issued for enhancement of duty. Their Lordship held that the price mentioned in the magazine was not mentioned in the show cause notice, and therefore, reliance on the said price mentioned in the magazine by the Custom Authorities must be held to be illegal. In the case of GTC Industries Limited (supra) while dealing with Section 11A their Lordships observed as under :-

"15...each show cause notice must be limited to the case that it is made out therein by the Revenue. It is not within the jurisdiction of the Tribunal to direct otherwise; to do so is to go beyond its purely adjudicatory function."

Mr. Mathur, learned Senior Counsel for the petitioner, while criticising the show cause on the above lines has also submitted that the quasi judicial authority has erroneously conferred the jurisdiction on itself on a wrong foundation which is not permissible in law. To substantiate the aforesaid submission he has placed reliance on the decision rendered in the case of Raza Textiles Ltd. Vs. Income Tax

Officer, Rampur, wherein the Constitution Bench held as under :

"3.... No authority, much less a quasi judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari...."

He has also placed reliance on the decision -rendered in the case of Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers, . He has also referred to Administrative Law by Wade (7th Edition Chapter 9) to highlight the concept of error outside jurisdiction.

As far as related person is concerned submission of Mr. Mathur, learned Senior Counsel, is that if the transaction between the manufacturers and buyers are on principal to principal basis, the latter is not a related person. It is also his contention that a related person must be one so associated with the assessee that they have interest directly or indirectly in the business of each other. Learned Counsel has also putforth that it is not enough that assessee has an interest directly or indirectly in the business of the person alleged to be related person nor it is enough that the person alleged to be a related person has any relation directly or indirectly in the business of the assessee. It is highlighted by him that mutuality of interest directly or indirectly is the test of related person. To highlight the aforesaid submission he has placed reliance on the decision rendered in the case of Union of India (UOI) and Others Vs. Atic Industries Ltd., . In the said case their Lordships expressed the view as under :-

"If the transactions between the manufacturer and his customer were on principal to principal basis and the wholesale price charged by the assessee to the customer was the sole consideration for the sale and no extra commercial considerations entered in the "determination of such a price, the customer cannot be held to be a "related person" merely because he holds 50% shares in the manufacturing Company. For treating the customer as a related person, the first part of the definition of "related person" as given in Section 4(4)(c) requires that the person who is sought to be branded as a "related person" must be a person who is so associated with the assessee that they have interest directly or indirectly in the business of each other. Thus, it is not enough that the assessee has an interest directly or indirectly in the business of the person alleged to be a related person nor is it enough that the person alleged to be a related person has any interest directly or indirectly in the business of the assessee. It is essential to attract the applicability of the first part of the definition that the assessee and the person alleged to be a related person must have interest direct or indirect in the business of each other. The equality and degree of interest which each has in the business of the other may be different; the interest of one in the business of the other may be direct while the interest of the latter in the business may be indirect, but that would not make any difference so long as each has got some interest direct or indirect in the business of the other. In cases, where 50% share of the manufacturing Company is held by the customer Company, the customer Company can be said to be having interest in the manufacturing Company as a

shareholder but for this reason, it cannot be said that the manufacturing Company has any interest direct or indirect, in the business carried on by one of its shareholders even though the shareholding of such shareholders may be 50%. In the absence of mutuality of interest in the business of each other, the customer Company holding shares in the manufacturing Company cannot be treated to be a "related person". " (Quoted, from the placitum)

In the case of Union of India (UOI) and Another Vs. Hind Lamp Ltd., it was held that the goods produced with customers brand name and one of the customer holding 50% shares in the manufacturing Company and the other four customers not holding such shares but they are associated with foreign companies holding 50% shares the customers cannot be treated as related person if no extra commercial consideration alleged and proved even if there is lurking doubt about them to be favoured buyers.

In the case of Escorts Tractors Ltd. Vs. Union of India, a Division Bench of Delhi High Court expressed the view that distributors although having share in seller company are not related persons in absence of mutuality of interest between the two, Mr. Mathur, learned Senior Counsel for the petitioner, has also placed reliance on certain other decisions of which I may notice a few to highlight that even if both buyer and seller are Limited Companies they are not liable to be considered related person if the buyer is a distributor of the manufacturer. This view has been expressed in the case of International Computer India Mfg. Co. Ltd. v. Collector of C. Ex. 1989 (41) E.L.T. 287 (Tri). The learned senior Counsel has also submitted that even if some employees are common between buyer and seller, Limited Companies are not liable to be considered as related persons. To buttress the aforesaid submission he has placed reliance on the decision rendered in the case of Renu Tandon Vs. Union of India (UOI), wherein it has been held as under :-

"Value of clearances of the two units cannot be clubbed together and the two units cannot be treated as one unit merely because of proximity of relationship or the situation of the two factories or because there are some common employees unless there is a clear and specific evidence that there is mutuality of business interest between the two units and that both have interest in the business of each other or they have common funding and financial flow-back. In the present case, the most important aspect about having common funding and financial flow-back is missing and therefore, to withdraw the assessment or club the clearances is wholly unjustified and illegal and without jurisdiction. Reference in this connection may be made to International Dyestuff Mfg. Co. v. Collector of Central Excise, Baroda 1991 (53) E.L.T. 85 (Tri)."

The learned Counsel has also contended that common Directors/Partners, common office premises, common Telephones , common telegraphic address, occasional use of machinery of one firm by other, does not mean related person. To fortify his submission he has placed reliance on the decision rendered in the case of 1985 ECR 17 . While citing this decision Mr. Mathur, learned Senior

Counsel has also submitted that the order passed by the Tribunal has been confirmed by the Apex Court.

The next ground of attack by the petitioner/Company is that it is entitled to assail the show cause as it is totally without jurisdiction and the plea of alternative remedy as raised by the Department is not tenable in the obtaining factual matrix. It is submitted that when notice to show cause is without legal foundation it is without jurisdiction. To highlight this aspect learned senior Counsel has placed reliance on two Division Bench decisions of this Court, namely, Jayant Vitamins Limited (supra) and Hindustan Electro Graphites Ltd. Vs. Union of India (UOI), wherein the Division Bench posed a question whether a notice issued by the respondents in exercise of jurisdiction conferred on Excise Officials by Section 11A of the Act is valid and after referring to the case of M/s. Chemphar Drugs and Liniments, Hyderabad (supra) held as under :-

"9. In the instant case, as already observed, there is absolutely no material on record to show that the petitioner company had committed any fraud or made any misrepresentation with regard to the particulars of the goods which would have misled the excise officials in deciding the relevant item of the First Schedule under which the excise duty could be levied on the goods in question. Even assuming that the item number of the First Schedule to the Act under which the excisable goods fall, has not been correctly shown by the petitioners, this fact, by itself, cannot lead to the inference that the assessee is guilty of fraud, suppression of facts or of wilful misrepresentation. Moreover, until the approval accorded by the excise officials to the classification list is reviewed in accordance with law, the question of any short levy, as alleged in the notice, does not arise. Under the circumstances, it cannot but be held that the notice Annexure "A", read with its corrigendum "A-I", is without jurisdiction and deserves to be quashed."

The learned Senior Counsel has also drawn the attention of this Court to a decision rendered in the case of Union of India (UOI) and Another Vs. Brij Fertilizers Pvt. Ltd. and Others, wherein the Apex Court affirming the order of the High Court quashing the show cause notice under the provision of Essential Commodities Act, 1955 has held that inference drawn by the appellants/Union of India was baseless and arbitrary. The learned Counsel has also placed reliance on the decision rendered in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, . The learned Senior Counsel has submitted that the decision quoted in the case of U.P. State Cement Corporation Ltd. v. Union of India 1996 (86) E.L.T. (All.) has been confirmed by the Apex Court holding that in the notice to show cause there was no allegation of mis-statement, wilful suppression of facts etc. and demand was barred by time. In the case of John Shalex Paints Pvt. Ltd. Vs. Union of India, the Court took note of the limitation of extended period of five years and found that in the show cause notice, apart from repeating the phrase "for and on behalf of, no allegation of any suppression or mis-statement is made by the Department, and hence, the show cause notice

did not satisfy the requirements of law i.e. proviso to Section 11A, and accordingly, it was defective.

I have referred in detail to the decisions cited by the learned Counsel for the petitioner so that legal position can be appreciated. Mr. Mathur, learned Senior Counsel for the petitioner, has urged with vehemence that the show cause notice is vague and does not satisfy the ingredients of the proviso to Section 11A(1) and all facts relating to two Companies were disclosed much prior to 1995. It is submitted by him that the Department knew that there are two common Directors and a common office premises; that PGHP is the sole buyer; and that agreement dated 19-11-1993 was filed on 2-5-1994. It is also canvassed by him that the relationship between PGIL and PGHP is principal to principal basis without having mutuality of interest as disclosed by letter dated 11-194 (sic) and the consideration of Rs. 17.80 crores was disclosed on 11-2-1995. The contention of Mr. Mathur is that when all facts were known to the department before 1995 just because a different opinion can be arrived at action u/s 11A cannot be taken as that is basically fallacious in absence of fraud or misrepresentation. Under these circumstances the learned Counsel has submitted that the plea of alternative forum or to go through the entire process of adjudication is unwarranted.

Now, I shall proceed to deal with the decisions cited by the respondents. Mrs. Indira Nair, learned Counsel, has placed reliance on certain decisions to highlight that the High Court under Article 226 of the Constitution should not interfere at the stage of show cause, if prima facie show cause is justifiable. In this regard the decisions cited are State of Andhra Pradesh Vs. M/s. T.G. Lakshmaiah Setty and Sons, , Union of India v. Bajaj Tempo Limited 1997 (94) E.L.T. (M.P.) 287, Methodex Systems Pvt. Ltd. Vs. Union of India (UOI), , Grasim Industries Ltd. Vs. Collector of Customs and C. Ex., Bata India Limited v. Commissioner of Central Excise, Patna 1999 (114) E.L.T. 79, M/s. Serai Kella Glass Works Pvt. Ltd. Vs. Collector of Central Excise, Patna, . The learned Counsel has also submitted that interference at the show cause notice is not always warranted and factum of limitation can be decided by the department. To substantiate the aforesaid stand she has placed reliance on the decisions rendered in the cases of 1999 (109) E.L.T. 32, Calcutta Chromotype Ltd. Vs. Collector of Central Excise, Calcutta, , Union of India v. Maheshwari Woollen Mills 1998 (97) E.L.T. 220, Union of India (UOI) Vs. Grasim Industries Ltd., . The learned Counsel for Union of India has taken me through various facts to show that PGHP will come within the category of related person of PGIL. To buttress her submission she has placed reliance on the concept of lifting the veil. In this regard she has drawn the attention of this Court to the decisions rendered in the cases of Calcutta Chromotype Ltd. (supra), Mohanlal Maganlal Bhavsar (Deceased) through Lrs and Others Vs. Union of India (UOI) and Others, , and Collector of Customs Vs. East African Traders, . In this context, she has also highlighted various aspects which govern the relationship between the two companies. This, I have already stated and the same need not be repeated at this juncture.

In the case of M/s. T.G. Lakshmaiah Setty and Sons (supra) the Apex Court ruled that the order of assessment under Andhra Pradesh General Sales Act should be tested under the relevant Act and the assessee should not be allowed to file application u/s 20 of the Act seeking revision of assessment orders passed by the original authority. In the case of Shyam Kishore v. Municipal Corporation of Delhi AIR 992 SC 2279 it was held that recourse to writ jurisdiction is not proper when more satisfactory solution is available on the terms of the statute itself. This Court in the case of Grasim Industries Ltd. (supra) where challenge was made in respect of the show-cause notice had declined to examine the matter on merits and left the petitioner to contest the same before the authorities. It is worth noting here that said matter was challenged in Apex Court and, eventually, the SLP was dismissed. Similar view has been expressed in the case of Methodex Systems Pvt. Ltd. (supra) wherein this Court observed that "show cause notices" are not the end but beginning of the matter. The Court proceeded to observe as under :-

"11. "Show cause notices" are not the end, but beginning of the matter. "Absence of jurisdiction" and "erroneous exercise of jurisdiction" are not liable to be intermixed. It is not suggested that notice is not under the relevant Act or Provision or not by the proper authority. Writ Court, these days, is receiving matters which can appropriately be contested at other forums fixed by relevant Acts. Is it not the time, ripe indeed, to exercise restraint, halt rush and push such cases towards their proper destination? The calendar of Court is quite congested. Should the writ Court then be not more strict to prevent in flow of cases which can be examined elsewhere and possibly with specific expertise?"

In the case of Seraikella Glass Works Pvt. Ltd (supra) the Apex Court observed as under :-

"This case is a good illustration of why the High Court should not intervene in revenue matters in exercise of writ jurisdiction where adequate alternative statutory remedies are available. In the instant case, complications have arisen because of the directions given by the Patna High Court on 15-9-1982 after quashing the various notices and orders in course of proceedings under the Central Excise and Salt Act."

I need not delve further into the concept of alternative remedy as at certain junctures the Courts have interfered and on certain occasions the Courts have refused to interfere. No litigant should feel that departmental adjudication are like courses from Ceaser to Ceaser. In this connection I may profitably refer to the decision rendered in the case of State of U.P. and another Vs. Labh Chand, the Apex Court expressed thus :-

"When a Statutory Forum of Tribunal is specially created by a statute for redressal of specified grievances of persons on certain matters, the High Court should not normally permit such persons to ventilate their specified grievances before it by entertaining petitions under Article 226 of the Constitution is a legal

position which is too well settled."

As far as related person is concerned Mrs. Nair, learned Counsel, has highlighted by citing number of authorities that the Department can lift the veil to find out whether two companies are related or not. To buttress her submission she has placed reliance on the decisions rendered in the cases of Calcutta Chromotype (supra) and East African Traders (supra). Needless to emphasize, whether a person is a related person or not, has to be scanned through in detail. In my considered view it is not possible to delve into that in exercise of jurisdiction under Articles 226 and 227 of the Constitution.

Now to the crux of the matter the notices of show cause. The present factual matrix is to be tested on the touch stone of aforesaid enunciation of law. There is no dispute that if notice to show cause is totally without jurisdiction it can be interfered with in exercise of jurisdiction conferred under Article 226 of the Constitution. If the show cause notice does not meet the requirements as envisaged u/s 11A(1) of the Act then also it can be lanced. At this juncture, it is apposite to refer to the relevant portion of show cause notice issued to FGIL which has been brought on record. It reads as under :-

"7. Through, the agreement dated 19-11-1993 the noticee have received an amount of Rs. 12.00 crores as non-compete fee in detergent business from PGHP & shall 1 crore each at the end of October, 1998 October 2000 and October 2001 respectively and another Rs. 2.80 crore. as fee for licence of Ariel Business. These have been collectively termed both by the noticee and PGHP in all their subsequent dealings and correspondences to the department as divestiture charges. The freedom of Ariel sales have been conveniently divested from the noticee from PGHP while the manufacturing activities rested with the noticee for which the divestiture charges have been paid. This dealing between the noticee and PGHP doe 5 not appear to be the result of any commercial compulsion for obvious reasons but a neatly cut and polished strategy to keep the price of produce at a key low level at the end of manufacturing so that the goods are under assessed for the purpose of payment of duty and then sell the goods at their will. The very term divestiture used to signify the dealing between the noticee and PGHP solemnly denotes that the dealing are not purely commercial but includes in its fold more elements than what meets the eyes. In view of the same the price fixed does not appear to be the sole consideration for sale and is influenced by the transaction as above.

Whereas by the dealings, the noticee have hijacked an opportunity to under value the goods manufactured by them, in absence of any competitive price and cleared the goods from the factory at a price conveniently fixed by it. Various other factors like advertising, marketing expenses etc. which contribute to the assessable value of the goods, thus have been excluded from the assessable value. In the name of divestitures charges also the noticee have received in all Rs. 14.80 crores and shall receive 3 crres more from time to time in consideration of transferring the Ariel business to PGHP.

From above it is clear that the price declared by the noticee from time to time can not be termed as the normal price u/s 4(1)(a) and whereas the MRP of the Ariel detergent after execution of the above agreement remains the same, the noticee arbitrarily decrease its assessable value. Moreover, even when the MRP of the product was revised upwards three time from Apr., 95, Nov., 95 and Jan., 96 the assessable value continued to remain the same and was not proportionately revised upwards. The reduction and non space revision of assessable value of the detergent powder is also indicative that the noticee have simply devised an arrangement for paying less revenue to the Government Exchequer and for reaping rich harvest in the bargain.

Whereas Section 4(i)(a) defines the value of the goods "as the normal price thereof that is to say the price at which the goods are ordinarily sold to a buyer in the course of wholesale trade for delivery at the time and place of removal where the buyer is not a related person and the price is the sole consideration for sale".

Whereas in the present case the price at which the goods have been sold to PGHP is not the normal price but it is a consider 3d price. M/s. PGI has received consideration of Rs. 12 crores and 2.80 crore 3 as discussed in para 7 above. Further the entire goods have been removed by the noticee to the depots of PGHP on stock transfer basis and accordingly the transaction is not a sale "ordinarily" in the course of wholesale trade as contemplated u/s 4 of the Central Excise Act and that price is not the sole consideration for sale of goods to PGHP. The goods manufactured by the noticee are not open for purchase from the noticee by any other willing buyer intending to purchase it. Here the sole buyer PGHP is a monopolistic buyer in contrast to "ordinary" buyers envisaged in Section 4(i)(a) of the Central Excise Act, 1944. Accordingly, the provisions of Rule 7 of the Central Excise Valuation Rules, 1975 become operative for determining the value of the goods.

1 Whereas the goods manufactured by the noticee enter the stream of whole sale trade, as postulated u/s 4, from the Depots of M/s. PGHP. Therefore, the price at which the goods are sold to the independent wholesale buyer, from the Depots of M/s. PGHP, appear to be normal price of the goods for the purpose of payment of duty.

2. Whereas M/s. PGHP vide their letter C.No. Nil dated 27-11-1998 have submitted their Depot Price for different packing prevalent during Dec. '93 to Sept. '97 (before introduction of MRP based assessment of the goods. The said price has therefore, being taken for determination of actual duty payable on the goods manufactured and removed by the noticee during the Dec. '93 to Sept. '97 which comes to Rs. 25,53,91,961/-. Details as per chart Annexure-A enclosed."

Before I comment on the aforesaid show cause notice, I shall advert to the factual matrix of W.P. No. 1232/99. In the said case the petitioner, M/s. Procter

and Gamble Home Products Limited, has assailed the show cause notice F. No. IV (9)20/98/HQr/17533, dated 23-12-1998 issued by the respondent therein. The allegation in the show cause is that the petitioner is the manufacturer of the detergent named "Ariel" and they are also brand name/trade mark owners of "Ariel". Mr. Mathur, learned Senior Counsel for the petitioner, while challenging the show cause on similar grounds has contended that the department has treated both the Companies as manufacturers which cannot be factually correct. In this context I may refer to the show cause notice which has been brought on record. The relevant portion of the show cause notice reads as under :

"2. Acting on a intelligence the officers of DGAE and Central Excise hqrs. Bhopal conducted [search] of the registered office premises of the noticee and M/s. Procter and Gamble Limited at Mumbai & Factory premises of M/s. Procter and Gamble India Limited at Mandideep District Raisen on 4-9-1998 which resulted in recovery of records/documents, Scrutiny of the records/documents reveals that the noticee is the actual manufacturer of "ARIEL" brand detergent powder (hereinafter referred to as the goods) inasmuch, they have entered into an agreement with M/s. Procter and Gamble (India) Ltd. Tiecicon House, Dr. E. Moses Road, Mumbai-400011 (hereinafter referred to PGI) for getting the said goods manufactured from M/s. PGI.

The highlights of the agreement dated 19-11-1993 in this regard, are as follows:

- (i) P.G-H.P. shall furnish to P.G.I, products and packaging specification including labelling and trade mark legend (hereinafter referred to as F.P. Specification).
- (ii) All F.P. Specification shall remain in the sole and exclusive property of P.G.H.P.
- (iii) PGI shall not use any of the F.P. Specifications in the manufacture or packing of any product either for itself or for third parties.
- (iv) PGI shall give all reasonable facilities to PGFP representatives to inspect and approve any lot of the product.
- (v) Upon the termination of the agreement PGHP shall purchase from PGI balance of products lying in stock and raw materials lying in stock if so desired. In any event PGI shall not use the balance raw material.

As could be evident from the terms and conditions of the agreement, the noticee holds not only the ownership of the Trade law-material and the packing materials. The goods are being manufactured by PGI on the specifications provided by the noticee. In this connection, the statement of Shri Ravi Prakash, Plant Finance Manager of PGI was recorded on 26-11-1998 wherein he had confirmed that the noticee has the final say in disposal of the finished as well as the raw materials. Further the product label and packing also brings out a clear message that the noticee are the manufacturers of the said goods in India. For brevity the product label description in verbatim is reproduced as under : -

"Ariel Compact - detergent powder made in India by Proctor & Gamble Home

Products Ltd. Mumbai- 400011.

Considering the terms & conditions of the agreement and the facts emerging out of the investigations, it appears that the PGI are simply an agent of the noticee who manufacture the said goods for them and accordingly the relation between the noticee and PGI cannot be termed as one of the principal to principal basis.

The noticee appear to have fabricated and devisee the agreement dated 19-11-1993 with sole intent to undervalue the goods and for causing loss to the government exchequer by presenting M/s. PGI Ltd. as the manufacturer, whereas in view of the above facts the noticee appears to be actual manufacturer and liable for payment of duty at the price the goods are sold by him in the course of wholesale trade.

Whereas it has been observed that the entire goods reach the wholesale market, only through the depots of the noticee as the PGI is restricted from dealing with anybody else through the agreement, Section 4(1)(a) of the Central Excise Act, 1944 defines the value of the goods as the normal price thereof, that is to say, the price at which such goods are ordinarily sold to a buyer in the course of wholesale trade for delivery at the time and place of removal where the buyer is not a related person and the price is the sole consideration for sale.

In the instant case the goods reach the wholesale trade stream, only through the depots of the noticee and the sale of the goods take place when it is removed from the depots of the noticee and hence the price charged by the noticee from their depots will have to be taken as the normal price of the said goods for the purpose of excise duty.

The noticee appears to have suppressed the fact of manufacturing the said goods wilfully for evading the Central Excise Duty chargeable thereon amounting to Rs. 63,25,30,972/- (details as per chart- A enclosed) which is recoverable from them by invoking the provisions of Section 11A of the Central Excise Act, 1944."

Commenting on the show cause it is submitted by Mr. Mathur that no additional information has been brought in the show cause except the agreement dated 19-11-1993 which was supplied by the petitioner to the department in the year 1994, and hence, no action can be initiated within the extended period of limitation. Per contra, Mrs. Indra Nair, learned counsel for the respondent, submits that after the raid on 4-9-1998 and obtaining certain documents the truth of the transaction came to light, therefore, it would amount to a case of suppression. She has also submitted that the department has not initiated the proceedings to realize the duty from both the companies but notices have been issued to both of them as there is relationship between the two companies which is prima facie deducible.

Mr. Mathur, learned Senior Counsel, has assailed the very essence of the show cause notice to highlight that it is unwarranted in law as nothing has been put forth in specific terms. He has also disputed the fact of relationship between

the two Companies and has submitted that both the companies are not related to each other as per the existing law. Mr. Mathur has also submitted that the documents were filed before the department and nothing was brought to the notice of department after the year 1995. The department has placed reliance on the show cause notice to show that both the companies are related and this fact came to be known in exact terms in the year 1998.

Considering the totality of circumstances and nature of show cause I am of the considered view it is apposite and appropriate that the petitioner should file a reply to show cause raising all the contention which have been raised before this Court so that the authority would appreciate and may withdraw the notice. The basic challenge being to "related person", "availability of documents" and the essential knowledge of the department, and these being questions of fact I do not intend to deal with the same and record findings in that regard. It is not one of those cases where a bare glance at the notice to show cause would make it manifest that the same is absolutely without jurisdiction or does not meet the ingredients of proviso to Section 11A(1). To arrive at the conclusion it does not meet the requirement of proviso to Section 11A(1), the facts are to be thrashed out, complexity of situation has to be scrutinised, analysed, probed into and investigated and the same is not possible in exercise of extraordinary jurisdiction of this Court. Hence, while declining to quash the show cause notices I permit the petitioners to file their reply to show cause notices on all the grounds and raise preliminary objection to the show cause that the same is not tenable under the eye of law. The Commissioner shall look into the same with objectivity and pass appropriate order. It is hereby made clear that the competent authority shall not travel beyond the show cause notice and shall confine itself to the allegations made therein. The show cause shall be filed within eight weeks from the date of this order.

With the aforesaid direction the writ petitions are disposed of without any order as to costs.