
(2002) 06 MP CK 0009

In the Madhya Pradesh High Court

Case No : Wri Petition No's. 856 and 1595 of 2001

Procter and Gamble Hygiene and Health Care Ltd.

APPELLANT

Vs

C.C. and C. Ex.

RESPONDENT

Date of Decision : 24-06-2002

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A(1), 35F
Constitution of India, 1950 — Article 226

Citation : (2004) 165 ELT 4

Hon'ble Judges : Arun Mishra, J

Bench : Single Bench

Advocate : A.M. Mathur and Sanjay Agrawal, for the Appellant; Sandeep Aole, for the Respondent

Final Decision : Dismissed

Judgement

Arun Mishra, J.—In these two writ petitions, the final order dated January 18th, 2001 (in W.P. 856/2001) and order dated 9-2-2001 (in W.P. No. 1595/2001) passed by the Commissioner of Customs & Central Excise, have been challenged directly in writ petitions on the ground that the appeal provided u/s 25F of the Central Excise and Customs Act before the Appellate Tribunal is an onerous remedy because before filing appeal, duty adjudged without jurisdiction will have to be deposited. The orders are challenged on the ground that they are without jurisdictions. The show cause notices which are basis of passing of final orders and the final orders are without jurisdiction.

2. First the relevant facts in W.P. No. 856/2001 be noticed. Petitioner submits that the petitioner is a company registered under the provisions of the Companies Act, 1956 having its registered office at Mumbai and factory at Mandideep, District Raisen, M.P. The petitioner-company is engaged in manufacture of Detergent Powder under the brand name of Ariel, falling under Chapter 3402.90 of the Central Excise Tariff Act, 1985. As the petitioner company is required to pay Central Excise duty on ad valorem basis, it has

submitted price declaration under Rule 173 of the Central Excise Rules before the Central Excise Department. Petitioner alleges that the petitioner company was incurring losses, and it has not added any notional profit for arriving the assessable value in the above price list. However, as desired by the Central Excise Department, the petitioner submitted a letter dated 9-5-1995 to the Central Excise Department, informing the schedule (14) forming part of account of annual report for the year 1993-94. Five years balance-sheet was also filed as per letter dated 30-8-1995 Annexure-P/5. On 14-2-1997 the petitioner was asked to submit written agreement between the petitioner and PGHP. In this letter it was also mentioned that on perusal of profit and loss account for the year 1993-94 an amount of Rs. 12.80 crores reflect as other income. The balance-sheet was to the knowledge of the department. At the time of audit the balance sheets were asked and they were given. A show-cause notice dated 3-7-1998 was issued proposing to recover Central Excise duty, amounting to Rs. 1,85,41,206/-. This demand was made under proviso to Section 11A(1) of the Central Excise Act, 1944. In show-cause notice Annexure-P/7 dated 3-7-1998 it was alleged that on scrutiny of the record it was revealed that the petitioner has cleared finished goods to Kanpur unit on repacking. The noticee had declared assessable value of the goods Rs. 30.12 per kg. for Ariel green and Rs. 30.44 per kg. for Ariel blue on the basis of cost data dated 26-11-1992. In terms of provisions of Rule 6(b)(ii) of Central Excise Valuation Rules, 1975 where the excisable goods are not sold by the assessee but are used or consumed by him or on his behalf in the production or manufacture of the articles, the value shall be based, where the value of comparable goods is not ascertainable in cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods. The noticee have filed a price list in proforma/part-VI vide their S. No. 35 on 27-11-1992, claiming assessable value on the basis of Chartered Accountant Certificate dt. 26-11-1992 and again a price declaration was filed on 7-4-1994 claiming the same value. Thereafter the noticee have not filed any declaration for the subsequent financial years. They have filed the declaration only on 4-9-1997 vide their letter dated 4-9-1997 for the period 95-96 onwards. In the above price declarations they have claimed the same value as declared on 27-11-1992 without adding the margin profit as if they have not earned any profit during these years. Whereas in the price declaration filed by them on 15-9-1997 for the same lass of goods they have included a 10% profit for arriving at the assessable value. Whereas on scrutiny of the balance-sheet for the period 93-94, 94-95, 95-96 and 96-97 it was found that the noticee have earned profit percentage for the period 93-94 sales was 273.0 crores, profit before tax Rs. 15.6 crores and percentage of profit was 6.06, for the period 94-95 sales was Rs. 268.0 crores, profit before tax was 14.6 crores and percentage of profit was 5.76, for the period 95-96 sales was 366.3 crores, profit before tax was Rs. 44.0 crores and percentage of profit was 13.65, for the period 96-97 sales was Rs. 307.6 crores, profit before tax was Rs. 39.8 crores and percentage of profit was 11.44. Therefore, it appears that the noticee have undervalued their product to the extent of profit margin which shall form

the part of assessable value for the purpose of payment of Central Excise duty in terms of Section 4(1)(b) of the Central Excise Act, 1944 read with Rule 6(ii) of Valuation of Rules 1975 which resulted in short payment of duty amounting to Rs. 1,85,51,206/-. The same is recoverable from the noticee in terms of Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A(1) of the Central Excise Act, 1944.

3. It was alleged in the show cause notice P/7 that the petitioner noticee have wilfully mis-stated the fact and has never disclosed the profit margin earned by them on the sale of goods, while filing the price declaration as required under Rule 173C of Central Excise Rules, 1944 with the department. The price declared in the price declaration does not include the element of profit margin for determining the unit value of the product. This fact has come to the notice of the department on scrutiny of their private records viz. balance sheet for the year 93-94, 94-95, 95-96 and 96-97. The noticee have, therefore, filed mis-statement with the department with an intention to evade excise duty and as such the extended period in terms of proviso to Section 11A(1) of Central Excise Act, 1944 is invocable. Therefore, excise duty of Rs. 1,85,51,206 along with penalty under Rule 173A of the Rules and Section 11AC of the Central Excise Act, 1944. Petitioner was also required to show as to why land, building, plant and machinery etc. should not be confiscated and interest on delayed payment would be recovered and penalty under Rule 209(A) of the Central Excise Rules, 1944 should not be imposed upon Shri Ashish Survey, Manager Plant & Finance, responsible for the finance, accounts and Central Excise matter of the noticee i.e. the concerned with removing, depositing, dealing with excisable goods etc. for short payment of duty of Rs. 1,85,51,206/-. This show cause notice has been questioned in W.P. No. 856/2001. Reply was filed by the petitioner Annexure-P/8 on September 29th, 1998. Final order was passed by the Commissioner, Customs and Excise, Hoshangabad Road, Bhopal, in January, 2001 Annexure-P/2. It has been found by the Commissioner of Central Excise in the price declaration/list filed by the assessee is accepted by the Department on the basis of information supplied/provided by them, if all the information is supplied correctly then of course the acceptance/approval is final. However, if certain new facts come into the knowledge of the Department afterwards, the accepted/approved declaration/lists can always be opened and if it is found that these new facts were earlier suppressed or wilfully misstated by the assessee, then the approval of the past five years can be reopened and differential duty if any is recoverable in terms of the proviso to Section 11A(1) of the Act. Relying upon J. K. Synthetics Ltd. and another Vs. Union of India and others, it was held that principles of res judicata or estoppel, are not applicable to tax matters. In the instant case, it is observed that the assessee had not filed any price declarations during 1993-94", 1995-96 and 1996-97 up to 4-9-1997. They had filed a price list on 27-11-1992 claiming the assessable value on the basis of Chartered Accountant's Certificate dated 26-11-1997 without adding or disclosing the profit margin to the Department. It was only when the Department verified/scrutinized their balance-sheets, it came

to the knowledge of the Department that they had made certain profits during the period in question but had not included the same in the assessable value declared by them. Thus, the suppression or wilful misstatement on their part is clearly proved and, therefore, the proviso to Section 11A(1) is rightly applicable in this case and so the demand raised vide notice dated 3-7-1998 is not hit by time limitation. The second notice dated 3-7-1998 is for the period April and May 1998, the returns for which were filed in May and June, 1998 respectively and so it is also not hit by time limitation as the demand has been raised within six months time period. Thus, no demand is time barred.

4. On merits, the Commissioner of Central Excise and Customs concluded in the order Annexure-P/2 that the assessable value is required to be determined in terms of the provisions of Section 4(1)(b) of the Act read with Rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975 as it existed at the relevant time. As per Rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975, the assessable value shall be determined on the basis of cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods. The determination of the assessable value in this manner is also not disputed by the assessee. However, the Commissioner found that the assessee, though have determined the assessable value in the above manner but have taken only the cost of production/manufacture and have not included the profit element in determination of the assessable value of their product during the period in question. The assessee's submission that after June 1993, their cost of production fell down but they had declared more assessable value is not tenable because had it been so they should have filed a revised price list/declaration claiming lower assessable value as no prudent person would like to pay more tax than actual, that too when they are claiming their factory to be running in loss. The assessee are having a number of units in different parts of the country since long and they also have a legal section. It is, therefore, very strange that when their production cost fell down they did not file a revised price list/declaration. By filing revised price list for lower assessable value they could have saved a substantial amount of money by paying less duty. The assessee's submission, therefore, carries no weight and hence not acceptable. The assessee's further submission, that they are a multi-product company and the profit shown in their balance-sheets is for other products as they had suffered loss in respect of the impugned goods, is also not tenable and appears to be an after thought only because they have not produced any evidence in support of their claim. Further, no assessee would like to run its factory continuously in loss and that too by paying more duty as in this case the assessee are claiming that their assessable value is more than the actual cost of production. It is not understandable that when they were incurring loss, why they had declared more value to pay extra duty. Their arguments are contradictory and misleading and not tenable. The assessee's plea that as their actual costs of production is far below the value declared by them, the question of further adding the profit element does not arise is baseless and needs no consideration because the production cost was

declared by them only. Their submission, therefore, that the value determined in the notice is incorrect and improper as the same is not based on actual cost of production is not acceptable. If their price had gone down at some time, they were at liberty to file revised price list claiming lower assessable value. Their failure does not give them a right to change or amend the rule and not to add profit element in the production cost for arriving at the assessable value. Rules nowhere provide such a concession.

5. It was further held, as regards to provisions of Sections 11AB and 11AC are concerned, the same are also applicable in this case because it is proved that the assessee had suppressed or wilfully misstated the facts. As it is proved from the foregoing that the assessee had suppressed certain information from the department by not disclosing profit element in the price declaration filed from time to time, their intention to evade duty is established and so they are liable for penalty u/s 11AC of the Act and so also the interest u/s 11AB of the Act is chargeable from them on the amount of duty confirmed. Their submission that for the period prior to 28-9-1996 (the date when Sections 11AB and 11AC were introduced) Sections 11AB and 11AC cannot be invoked, is not acceptable because in the instant case the show cause notice was issued on 3-7-1998 i.e. much after 28-9-1996. Further as contravention of provision of Rules 9(1), 173C and 173F and also the evasion of duty is proved, penalty under Rule 173Q of the Rules is also imposable on them.

6. As regards to assessee's submission regarding second show cause notice dated 30-10-1998, it was concluded that assessable value has been calculated wrongly. The assessable value at which the assessee had cleared the goods is also shown incorrect in it by the Range Superintendent. The assessee, for the period covered in this notice, had filed a proper declaration showing cost of production as Rs. 39.55 and to this adding a notional profit of 10% i.e. Rs. 3.95, they had claimed the assessable value as Rs. 43.50 (Rs. 39.55 + 3.95). The assessee during April and May, 1998 had cleared their goods at this rate only. However, from the balance-sheet it is seen that they had earned a profit of Rs. 12.12%. Taking this percentage of profit, the assessable value comes as Rs. 44.34 (Rs. 39.55 plus Rs. 4.79) and duty calculation was accordingly made and it was held that the assessee had short paid duty amounting to Rs. 37,725.00 only during April and May, 1998 and not Rs. 1,59,055.00 as alleged in the notice.

7. In W.P. No. 1596/2001 order dated 9-2-2001 passed by the respondent; Commissioner of Customs and Central Excise has been assailed. A show cause notice dated 3-7-1998 P/26 was issued on the ground that whereas, in terms of provision (iii) of Sub-section 1(a) of Section 4 of Central Excise Act, 1944, where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal of dealers (not being related

persons) or where such goods are not sold to such dealers to dealers (being related persons), who sell such goods in retails and whereas Sub-section 4(c) of Section 4 defines related person as person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes holding company, a subsidiary company, a relative and distributor of the assessee, and any sub-distributor of such distributor. In November 1993 an agreement was entered into by Procter and Gamble India Ltd. with M/s. Procter & Gamble Home Products Ltd. The main conditions of the agreement are :

(i) Procter & Gamble India (i.e. the noticee) shall sell and Procter & Gamble Home Products shall purchase from Procter & Gamble India on a principal-to-principal basis products viz. (Ariel micro system and Ariel Detergent powder manufactured by Procter & Gamble India).

(ii) Procter & Gamble Home Products shall furnish to Procter & Gamble India products and packaging specifications including labelling and trademark legend (hereinafter referred to as F.P. specifications).

(iii) All F.P. specifications shall remain in the sole and exclusive property of Procter & Gamble Home Products.

(iv) Procter & Gamble India shall not use any of the F.P. specifications in the manufacture of packing of any product either for itself or for third parties.

(v) Procter & Gamble India shall give all reasonable facilities to Procter & Gamble Home Product's representatives to inspect, take samples of, approve of and/ reject any lot of the product.

(vi) If any sample of the products fails to be approved because of variance from the F.P. specifications for the products, it shall be destroyed or reprocessed.

(vii) Upon the termination of the agreement Procter & Gamble Home Products shall purchase from Procter & Gamble India, balance of products lying in stock and raw materials lying in stock if so desired. In any event Procter & Gamble India shall not use the balance raw material.

(viii) That the purchase price for each product shall be determined from time to time, the parties however agreed that the price shall be exclusive of all taxes, levies and duties on manufacture of sale of consignment transfer which may be or become payable subsequent to the issue of invoice and which will be borne, paid or reimbursed to Procter & Gamble India by Procter & Gamble Home Products. Such agreed price shall be subject to review once every six months.

8. The show cause notice alleges that according to the terms and conditions of the agreement the noticee (i.e. Procter & Gamble India) is manufacturing and supplying the product i.e. Ariel Micro system detergent powder, to the dealers of the Procter & Gamble Home Products.

9. In view of this agreement Procter & Gamble India i.e. the noticee had received

amount of Rs. 10,00,00,000/- (ten crores) as non compete fee plus Rs. 2,80,00,000/- (2.8 crores) as licence, of Ariel business as appeared in balance sheet for 1993-94 and also clarified by Shri J.S. Bhansali authorized representative of the noticee vide letter dated 9-5-95.

10. Whereas, summons dated 10-3-1998 and 18-3-1998 were issued to M/s. Procter & Gamble India and Procter & Gamble Home Products asking them to produce agreement entered by M/s. Procter & Gamble India regarding divesting of business to M/s. Procter & Gamble Home Products, information about corporate owners of share capital, details of their management etc. M/s. Procter & Gamble Home Products has not responded till date to the said summons. It is alleged that the payment of Rs. 10 crores as non compete fee and 2.8 crores as licence fee are nothing but are arrangements made to finance the production of the product which solely purchased by Procter & Gamble Home Product and Procter & Gamble Home Product also has say over the pricing of the said products. Therefore, it appears that the noticee had received Rs. 12.80 crores from Procter & Gamble Home Product, i.e. sole buyer on the condition that Ariel and Ariel microsystem detergent powder is sold/marketed by Procter & Gamble Home Product only. Thus, it is very much clear that price declared by the noticee from time to time cannot be termed to as normal price u/s 4(1)(a) of Central Excise Act, 1944. It was also noticed that prior to 1-4-1994 excisable goods manufactured by the noticee were cleared to various sales depots on payment of duty at the ex-factory prices declared in the price lists filed under Rule 173C of the rules. From 1-4-1994 i.e. from the date the new "invoice based assessment system" was introduced, assessable value for payment of excise duty was reduced by the noticee arbitrarily. There was however, no change in the Maximum Retail Price (MRP) of these goods and MRP prevailing as on 1-1-1994 had continued from 1-4-1994 also. This reduction in assessable value resulted short payment of duty amounting to Rs. 4,11,77,059/- for the period April, 94 to June, 96 (As per Chart-I). The same is liable to be recovered from the noticee in terms of Rule 9(2) of the rules read with proviso to Section 11A(1) of the Central Excise Act, 1944.

11. It was also further noticed that in terms of Para 5.2 of the agreement between Procter & Gamble India Ltd. and Procter & Gamble Home Product, prices were required to be reviewed and revised every six months but no such revision was done and the goods were being assessed to duty on the value as on 1-4-1994, although MRP of the goods manufactured by Procter & Gamble India Ltd. were revised upwards from April'95, November'95 and Jan'96. Therefore, it appears that the noticee had short paid central excise duty of Rs. 1,55,22,330/- due to non revision of assessable value proportionately with reference to upward revision of MRP and the same is liable to be recovered from them in terms of Rule 9(2) of the rules read with Section 11A(1) of the Central Excise Act, 1944 for the period 4/94 to 6/96 (As per Chart-II). The noticee has never disclosed the fact regarding upward revision of MRP to the department and as such extended period in terms of Section 11A(1) of the Central Excise Act, 1944 is invocable.

The noticee have wilfully suppressed this fact i.e. collection of extra commercial consideration from M/s. Procter & Gamble Home Product (the only buyer of the brand) and such collection of extra commercial consideration was never disclosed by the noticee while filing of price list as required under Rule 173C of the rule with the department and the price declared in the price list does not include the incidence of this extra commercial consideration for determining the unit value of the product. Since the noticee has wilfully suppressed the fact with the intention to evade the duty by undervaluing their product thus the extended period in terms of proviso to Section 11A(1) of the Central Excise Act, 1944 is invocable. Therefore, central excise duty amounting to Rs. 5,66,99,389/- was proposed to be recovered and penalty under Rule 173Q and land, building, plant and machinery etc. of the noticee were proposed to be confiscated under Rule 173Q(2) of the Central Excise Rules, 1944. The noticee's were also informed about the interest on delayed payment and penalty under Rule 209(A) of the Central Excise Rules, 1944.

12. The defence of the assessee as disclosed in reply dated 14-9-1998 it was a case of manufacture and sale, by separate agreement dated 21-4-1994 effective from 1-11-1993 they have transferred the business of marketing and selling the said goods to M/s. PGHP and they were concerned with the manufacture and sale of the goods to M/s. PGHP and the marketing and distribution thereof was the sole responsibility of M/s. PGHP. As they were no longer concerned with the marketing of the said goods, all such marketing and distribution expenses were no longer incurred by them. The assessable value of the goods were revised in accordance with rules. During the relevant period the excise duty was chargeable on the said goods on ad valorem basis. MRP had nothing to do with the levy of excise duty. The department was aware of the agreement as well as the agreement for transfer of the business of marketing and distribution of the said goods by them to M/s. PGHP.

13. The Commissioner of Excise held in Para 22 an amount of Rs. 5,66,99,389/- along with penalty to the same extent has been imposed and penalty of Rs. 1,00,00,000/- under Rule 173A on Procter & Gamble India Ltd. and interest on the demand confirmed and penalty of Rs. 10,00,00,000/- was imposed on petitioner No. 2. Thus, show cause notice date 3-7-1998 was disposed of accordingly.

14. Shri A.M. Mathur, learned Senior Counsel for the petitioners submits that the show cause notice dated 3-7-1998 in W.P. No. 856/2001, consequent final order is bad in law for the reason that the department had knowledge of the balance sheets. Balance-sheets were in possession since 1995 as apparent from letter Annexure-P/5, department had knowledge from May, 1994 that assessee was not adding 10% profit element in assessable value established by show-cause notice Annexure-P/9, reply Annexure-P/10 and adjudication order dated 31-10-1995. The allegation that no final price declaration was filed between 7-4-1994 and 4-9-1997 is wrong as there was no change in value between 1994 and 1997,

therefore, there was no legal obligation to file price declaration every year i.e. 1995 and 1996. The adjudication order, dated 18-1-2001 P/2 is thus bad in law. Learned Counsel has relied upon certain decisions to contend that there should be material on record to show that the petitioner company had committed fraud or misrepresentation with regard to particulars of goods which have misled the excise officials. In the absence of proof of such facts, notice u/s 11A is without jurisdiction. Proviso is in nature of exception to principal clause. Therefore show cause notice was vague. Commission or omissions of proviso was not informed. There was no conscious or deliberate withholding of information. Department has placed no material on record to show either suppression or mis-statement. There is no proof of intention to evade duty. Learned Counsel further submits that availability of alternative remedy is no bar. Since there was no suppression or misstatement of fact at any time, hence, by the aid of proviso to Section 11A(1) period could not be extended from six months to five years.

15. In W.P. No. 1595/2001 the petitioner submits that duty was demanded as per notice dated 3-7-1998 Annexure-P/26 for the period April, 1994 to June, 1996, adjudication order Annexure-P/2 was passed on 9-2-2001. As per show cause notice dated 23-12-1998 the duty was demanded from December, 1993 to September, 1997, which was assailed in W.P. No. 1233/1999 decided by this Court on June 28th, 2000. L.P.A. No. 80/2000 is pending. Hence, it was not open for the department to adjudicate the duty for the period April, 1994 to June, 1996.

16. The respondents contend that the orders are proper. Show cause notices were properly issued. Remedy of appeal is available, which is efficacious and disputed questions of facts cannot be decided in the present writ petitions. Remedy of appeal cannot be said to be onerous. Reliance has been placed on Todi Industries Ltd. Vs. Union of India (UOI) and Others, ; Union of India (UOI) Vs. Bajaj Tempo Limited and Others,

17. First I take up for consideration the Writ Petition No. 856/2001. It has been argued on behalf of petitioner that the Commissioner had no jurisdiction to issue notice to show cause and to pass consequent final order. The time limit for issuing show cause notice is six months u/s 11A of the Act. If the excise duty is evaded with collusion or suppression of fact, time limit is five years, thus extended period of limitation was not available to the Commissioner. Department had knowledge from the balance-sheets. Thus, petitioner submit the findings recorded in the final order are perverse. Thus, interference should be made in the writ petitions.

18. Learned Counsel for the petitioner has relied upon the decision of the Apex Court in Collector of Central Excise, Hyderabad Vs. Chemphar Drugs and Liniments, Hyderabad, Para 8 it was held that intent to evade payment of duty is a must, coupled with fraud, collusion wilful misstatement, suppression or contravention of any provision of Act or rules to evade payment of duty, which is quoted below :

"in order to make the demand for duty sustainable beyond a period of six months and up to a period of five years in view of the proviso to subsection 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 or either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacture or producer or conscious or deliberate withholding of information when the manufacture knew otherwise, if required before it is saddled with any liability before the period of six months."

In Padmini Products Vs. Collector of Central Excise, Bangalore, it has been held by Apex Court that mere failure or negligence is not enough, in Para 8 it has been held as under :

"mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was scope for doubt as to whether licence was required to be taken out or where there was scope for doubt whether goods were dutiable or not, would not attract Section 11A of the Act.

Something more positive than mere inaction or failure to disclose is required to extend period beyond six months as held by the Hon"ble Apex Court in Lubri-Chem Industries Ltd. Vs. Collector of Central Excise, Bombay, in Para 6 :

"it had to be established that excise duty has not been short-levied or paid by reason of fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or the Rules with intent to evade payment. Something more positive than mere inaction or failure on the part of the assessee or conscious or deliberate withholding of information when the assessee knew otherwise was required before the assessee could be saddled with any liability beyond the period of six months."

The provision to Limitation has to be construed strictly as held by the Supreme Court in Tamil Nadu Housing Board Vs. Collector of Central Excise, Madras and Another, in Para 3 :

"a bare reading of the proviso indicates that it is in nature of an exception to the principal clause. Therefore, its exercise, is hedged one hand with existence of such situation as have been visualized 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 concern 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."

In Collector of Central Excise Vs. H.M.M. Limited, in Para 2 the Apex Court held that fact must be clearly stated in show cause notice :

"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 five years. Unless the assessee is put to notice the assessee would have no opportunity to meet the case of the department. The default enumerated in the first 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."

Assessee must be clearly put to notice of facts in show cause notice. In *Raj Bahadur Narain Singh Sugar M. Ltd. Vs. Union of India (UOI) and Others*, , in Para 9 the Supreme Court held that :

"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 default 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 *Kaur & Singh v. CCE, New Delhi 1997 (94) E.L.T. 289*, in Para 3 the Supreme Court emphasized that natural justice require a specific show cause notice to invoke longer period of limitation :

"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 therefore, is no scope for assuming that the ground is implicit in the issuance of the show cause notice."

This Court in *Jayant Vitamins Limited Vs. Union of India (UOI)*, held that if a show cause notice is without jurisdiction, availability of alternative remedy is no bar :

"as such we hold that the extended period of five years is inapplicable in the instant case as prima facie there is no proof of suppression of facts, mis-statement, collusion and contravention of law or rule. The notice impugned issued u/s 11A of the Central Excise & Salt Act by the Collector, Central Excise is without jurisdiction. Now, it is well settled principles of law that when any action of the Executive Authority is without jurisdiction, then availability of an alternative remedy is no bar to the exercise of the jurisdiction of this Court under Article 226 of the Constitution" -- (Paras 19 & 20)."

19. Learned Counsel for the petitioners submits that in view of the aforesaid

decisions this Court should make interference in the writ petitions directly and the petitioners should not be asked to avail the statutory remedy of appeal available under the Act as the remedy of appeal is onerous.

20. It has become necessary to examine prima facie whether order is palpably without jurisdiction. I venture to consider various findings recorded by the Commissioner of the Central Excise and Customs. This course is adopted to do justice to the various submissions raised by learned Senior Counsel for the petitioners though in my considered opinion facts are such the orders cannot be said to be without jurisdiction and remedy of appeal is the appropriate remedy. I do so without meaning to record a finding on merit of the case with limited purpose whether writ jurisdiction of this Court should be exercised.

21. In the instant case, it is clear that the price declaration/list filed by the assessee, was accepted by the department on the basis of information supplied/provided by them. If all the information is supplied correctly then of course the acceptance/approval is final. However, if certain new facts come into the knowledge of the department afterwards, the accepted/approved declarations/lists can always be opened and if it is found that these new facts were earlier suppressed or wilfully misstated by the assessee, then the approval of the past five years can be reopened and differential duty if any is recoverable in terms of the proviso to Section 11A(1) of the Act. There is finding recorded that the assessee has not filed price declaration from 1993-94, 1995-96 and 1996-97 up to 4-9-1997. They had filed a price list on 27-11-1992 claiming the assessable value on the basis of Chartered Accountant's Certificate dated 26-11-1992. In the price declarations filed on 7-4-1994 and 4-9-1994 they claimed the same assessable value as in the price list dated 27-11-1992 without adding or disclosing the profit margin to the department. There is further finding recorded that it was only when the Department verified/scrutinized their balance-sheets, it came to the knowledge of the department that they had made certain profits during the period in question but had not included the same in the assessable value declared by them. Thus, the suppression on wilful misstatement on their part is clearly proved, is the finding recorded, therefore, the Commissioner invoked the proviso to Section 11A(1). On facts, the Commissioner has further recorded categorically a finding that the assessable value was determined by the assessee only considering cost of production/manufacture not included the profit element in determination of the assessable value of their product during the period in question. The assessee's submission that after June 1993, their cost of production fell down but they had declared more assessable value is not tenable because had it been so they should have filed a revised price list/declaration claiming lower assessable value as no prudent person would like to pay more tax than actual, that too when they are claiming their factory to be running in loss. The assessee are having a number of units in different parts of the country since long and they also have a legal section. It is, therefore, very strange that when their production cost fell down they did not file a revised price list/declaration. By filing revised price list for lower assessable value they could have saved a

substantial amount of money by paying less duty. The assessee's submission has not been accepted by the Commissioner. But, there is further finding recorded that the assessee had suppressed certain information from the Department by not disclosing profit element in the price declaration filed from time to time, their intention to evade duty is established, hence, they have been held liable to make payment of duty and penalty along with interest.

22. In view of the findings recorded, it is apparent there is disputed factual aspects. It cannot be said at the outset that the order passed by the Commissioner of Central Excise and Customs is palpably erroneous. The price declaration was not filed for the several years. Admittedly in the declaration the profit element was not mentioned, declaration was not as per rules. Non filing of correct price declaration has been held to be wilful misrepresentation or the case of suppression. Thus there are two categories enumerated; proviso to Section 11A makes it clear that if the excise duty has not been 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, five years period is provided. The declaration which was required to be filed was not filed as required under the law. Moreover in the certificate filed of Chartered Accountant profit element was not mentioned. Petitioner case that the costs of manufacture fell down as such profit part should be deemed to be included in assessable value. All these aspects require factual investigation. Thus, the order passed by the Commissioner on 18-1-2001 P/2 in W.P. No. 856/2001 cannot be said to be such which requires an interference in the writ jurisdiction of this Court, but, can be properly looked in from all angles in an appeal.

23. Learned Counsel for the petitioner has pressed into service the decision of the Apex Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , wherein the Apex Court has laid down that the jurisdiction of the High Court in entertaining a Writ Petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation which factual situation is not available in the instant case. There is no averment as to violation of principle of natural justice.

24. Apex Court in Todi Industries Ltd. Vs. Union of India (UOI) and Others, has held that normal statutory appeal lies before the Tribunal, that should be availed. Similar is the view taken by the Apex Court in Union of India (UOI) Vs. Bajaj Tempo Limited and Others, and by this Court in Steel Ingots Ltd. Vs. Asstt. Collector of Central Excise, As to point of limitation the Hon''ble Supreme Court has held that the point of limitation is to be decided by departmental adjudicatory authorities, in Shri Vivekanand Mills Ltd. v. Union of India 1999 (109) E.L.T. 32 (S.C.).

25. The reason disclosed for filing the writ petitions directly before this Court and not availing the alternative remedy in para 9 of the Writ Petition No. 856/2001, is that the alternative remedy is onerous because before filing appeal, duty adjudged without jurisdiction will have to be deposited. Petitioner will have to comply with the condition. Section 35F of the Central Excise and Customs Act requires deposit of duty and penalty. Section 35F is quoted below :

"35F. Deposit, pending appeal, of duty demanded or penalty levied. -Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied :

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interest of revenue".

26. In my opinion when the legislature has thought in its wisdom that duty and penalty should be deposited before the adjudicating authority, the provision cannot be said to be onerous, I am fortified in my view by decision of the Apex Court in *Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay*, the Apex Court considered provision under the Customs Act and observed that right of appeal contemplated u/s 129A and 129E is a conditional one and the legislature in its wisdom has imposed that condition of depositing duty demanded or penalty levied. The right is a conditional one and the legislature in its wisdom has imposed that condition. No question of whittling down that right by an alteration of procedure arises. In para 9 their Lordships held that right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the condition in the grant. In *Shyam Kishore and others Vs. Municipal Corporation of Delhi and another*, the Apex Court considered the provisions of appeal u/s 170(b) and observed that resort to Articles 226 and 227 should be discouraged when there is an alternative remedy.

27. Moreover, under proviso to Section 35F of the Act in any particular case, the Commissioner or the Appellate Tribunal is of the opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interest of revenue. Legislature has made the provision in the interest of revenue which mandate cannot lightly be defeated by directly entertaining the writ petition in such matters where the orders passed

are not shown to be without jurisdiction or manifestly unjust.

28. W.P. No. 1595/2001 also involves investigation into question of fact; what is the relationship of the PGI and PGHP has to be determined on facts which has to be done by the appellate authority. PGI is the producer of Ariel and they have entered into an agreement with PGHP, Disputed questions of facts cannot be determined, documents and knowledge to the department and whether Section 11A(1) is attracted, involves inquiry into facts. All these questions can be decided in an appeal properly which cannot be said to be an onerous remedy and what has been stated in the context in W.P. 856/2001, need not be reiterated with respect to W.P. No. 1519/2001, challenge is not to the show cause notice, but, to the final order, against which appeal lies. Apex Court in M/s. Serai Kella Glass Works Pvt. Ltd. Vs. Collector of Central Excise, Patna, has held that :

"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 courses of proceedings under the Central Excise and Salt Act."

29. In State of U.P. and another Vs. Labh Chand, the Supreme Court has laid down that :

"When a Statutory Forum of Tribunal is specially created by a statute for redress 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."

30. Learned Counsel for the petitioners submitted that another Bench of this Court had dismissed the writ petitions No. 1232/1999 and W.P. No. 1233/1999 on 28-6-2000 in which show cause notices issued on December 23rd/ 1998 were assailed. L.P.A. is pending against that decision. Thus, this Court should not hear in the present petition till the decision of L.P.A.

31. In the present Writ Petition - W.P. 856/2001 subject matter is totally different. This is not against show cause notice, but, against the final order.

32. In W.P. No. 1595/2001 the challenge is to the final order Annexure-P/2, passed on 9-2-2002 upholding the different show cause notice dated 3-7-1998.

33. Thus, in my opinion, when petitioner is having the remedy against the final order passed by the adjudicating authority u/s 35B before the Tribunal, no interference is called in these writ petitions.

34. Resultantly, both the writ petitions are dismissed with liberty to the petitioners to avail the alternative remedy of appeal. No orders as to costs.