

(2021) 04 BOM CK 0016

In the Bombay High Court

Case No : Writ Petition (STAMP) No.5922 Of 2020

Supermax Personal Care Pvt. Ltd

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 08-04-2021

Acts Referred:

Constitution Of India, 1950 — Article 226
Central Excise Valuation (Determination Of Price Of Excisable Goods) Rules, 2000 — Rule 8, 10A, 10A(ii)
Cenvat Credit Rules, 2004 — Rule 3
Central Excise Rules, 2002 — Rule 8, 25
Central Excise Act, 1944 — Section 2(e), 2(f), 4A, 11AA, 11AC, 11A(4), 11D, 11D(1A), 11D(2), 11DD, 35E

Citation : (2021) 04 BOM CK 0016

Hon'ble Judges : Ujjal Bhuyan, J;Milind N. Jadhav, J

Bench : Division Bench

Advocate : Prakash Shah, Mihir Mehta, Jas Sanghavi, Pradeep S. Jetly, J. B. Mishra

Final Decision : Allowed

Judgement

Ujjal Bhuyan, J

1. Heard Mr. Prakash Shah, learned counsel for the petitioner and Mr. Pradeep S. Jetly, learned senior counsel for the respondents.
2. By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of show cause-cum-demand notice dated 26. 05.2020 issued by the Commissioner of Central Goods and Services Tax and Central Excise, Audit-Thane i.e. respondent No.2.
3. Case of the petitioner is that it is a company registered under the Companies Act, 1956 and is engaged in the business of manufacturing of excisable goods, such as, safety razors, blades and shaving system as well as cold rolled stainless steel strips falling under Chapters 82 and 72 of the Central Excise Tariff Act, 1985

(briefly "the 1985 Act" hereinafter). It is stated that petitioner has its factories at Wagle Industrial Estate, Thane-400 604; Pritesh Complex, Dapoda Road, Bhiwandi; Thane Nasik Highway, Bhiwandi; and also at Hyderabad. Apart from such factories petitioner has depots and clearing and forwarding (C & F) agents at various locations across India.

4. In the ordinary course of business petitioner had availed CENVAT credit of the excise duty/service tax paid on inputs/inputs services and utilized the same for payment of excise duty on the goods manufactured by the petitioner. Be it stated that the assessable value for payment of excise duty on the final produce, namely, safety razor blades and shaving system are determined under section 4A of the Central Excise Act, 1944 (briefly "the Central Excise Act" hereinafter) i.e. maximum retail price declared on the package less prescribed abatement.

5. Petitioner has described the process of manufacturing carried out by it in converting the raw material i.e. cold rolled stainless steel strips into the finished product i.e. safety razor blade and shaving system. It is stated that petitioner had entered into an agreement dated 07.10.2011 with Tigaksha Metalics Pvt. Ltd. ("Tigaksha" for short) for the purpose of processing of the goods on job work basis as per the terms and conditions contained therein. This agreement was renewed by three successive agreements dated 07.10.2012, 7. 10.2013 and 01.04.2014. It is stated that petitioner had entered into another agreement dated 01.04.2015 with Tigaksha for further processing of petitioner's goods including packaging for retail sale. The agreement dated 01.04.2015 was for the period 01.04.2015 to 31.03.2018.

5.1. Petitioner has stated that the language and clauses of all the agreements entered into by the petitioner with Tigaksha were identical.

6. Petitioner had transferred some of the intermediate/semi-finished goods on payment of excise duty at 110% of the cost of production under Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (referred to hereinafter as "the Valuation Rules") to one of its depots situated at Garget, Una, Himachal Pradesh. The goods were consigned to Tigaksha at Garget, Una, Himachal Pradesh for further processing under the aforesaid agreements i.e. agreement dated 01.04.2014 and agreement dated 01.04.2015.

7. Petitioner has explained that the main input/raw material used by the petitioner is the cold rolled stainless steel coils which the petitioner receives on payment of duty from its suppliers at its factory at Thane. Petitioner had availed credit of the excise duty paid thereon under Rule 3 of the CENVAT Credit Rules, 2004 (also referred to as "the CENVAT Credit Rules"). Thus, petitioner processed the said cold rolled stainless steel coils into strips and further processed into blades and other components of shaving system transferring those to its branch at Una, Himachal Pradesh where those were consigned to Tigaksha on payment of excise duty under Rule 8 of the Valuation Rules i.e. @ 110% of the cost of production. Invoices for such clearance of the processed goods were billed to its

own depot at Garget, Una, Himachal Pradesh and were consigned directly to Tigaksha for further manufacturing. Such clearances were treated as branch transfer and as such no Central Sales Tax was payable and paid by the petitioner on such branch transfer.

8. Tigaksha claimed exemption from payment of excise duty on the goods manufactured by it including for the job work done for the petitioner in terms of Notification Nos.49/2003 and 50/2003, both dated 10.06.2003. Those notifications being area based notifications, Tigaksha did not take credit of the duty paid by the petitioner on the goods supplied by it to Tigaksha for job work at the time of removal of the goods from the petitioner's factory at Thane as Tigaksha had claimed exemption from payment of duty on the goods manufactured by it. Tigaksha manufactured final products, namely, safety razor blades and shaving system from out of goods supplied by the petitioner on job work and cleared those goods for home consumption without payment of excise duty. Tigaksha delivered the final products to the petitioner at its depot at Garget, Una, Himachal Pradesh. The final products manufactured by Tigaksha were packaged commodity with maximum retail price affixed on the package as per the Legal Metrology Act, 2009 under which the maximum retail price was inclusive of all taxes. The final products are transferred by the petitioner from Garget, Una, Himachal Pradesh to its various depots and C & F agents across India from where the goods are sold by the petitioner on payment of Value Added Tax/Central Sales Tax, as may be applicable

9. The package of the goods manufactured by Tigaksha clearly declared Tigaksha as manufacturer and packer at Himachal Pradesh. Name of the petitioner appears only as "marketed by". In contrast, in case of finished goods manufactured by the petitioner at Thane, the declaration on the package reads as "manufactured, packed and marketed by". The finished goods manufactured by the job worker i.e. Tigaksha are brought to the factory of the petitioner at Thane over which respondent No.2 exercises jurisdiction under the Central Excise Act.

10. Central Excise Revenue Audit (CERA) in respect of the petitioner was initiated by the Central Excise Department for the period from 2013-14 to 2017-18 (upto June 2017). Objections raised by the auditors included allegations to the effect that petitioner had collected excise duty from the customers but had not deposited the same with the government; finished goods manufactured at the factory of the job worker were cleared to various depots of the petitioner for onward sale in the market without payment of excise duty; petitioner also manufactured similar goods at its factory at Thane and other places which were sold upon payment of excise duty; maximum retail price of the goods cleared/manufactured by Tigaksha and other factories of the petitioner was the same etc. Such objections were communicated to the petitioner vide letter dated 28.09.2016.

11. Responding to such audit objection communicated to the petitioner vide

letter dated 28.09.2016, petitioner submitted a detailed explanation on 19.10.2016. Thereafter there was exchange of correspondence between the auditors and the petitioner. Ultimately, notice to show cause-cum-demand dated 26.04.2018 was issued to the petitioner by the Commissioner of Central Goods and Services Tax (CGST) and Central Excise, Thane Commissionerate i.e. respondent No.3 calling upon the petitioner to show-cause as to why central excise duty amounting to Rs.82,02,22,391.00 should not be demanded and recovered from the petitioner under section 11A(4) and section 11D(2) of the Central Excise Act being the duty payable for the period 2013-14 to 2017-18 (upto June 2017); interest as applicable on the amount of duty determined to be payable under section 11DD of the Central Excise Act; and as to why penalty under section 11AC of the Central Excise Act read with Rule 25 of the Central Excise Rules, 2002 should not be imposed.

12. By letter dated 27.08.2019, petitioner showed cause by making a detailed representation and requested for dropping of proceedings.

13. Vide the order in original dated 20.11.2019, respondent No.3 held that the goods in question were manufactured by Tigaksha at Himachal Pradesh which was beyond the jurisdiction of respondent No.3. Hence, the demand was not maintainable under section 11A(4) of the Central Excise Act. Further it was held that the demand notice failed to bring out any evidence to establish that any amount was collected by the noticee (petitioner) as representing duty of excise. Therefore, section 11D of the Central Excise Act was not attracted. For the aforesaid reasons, the notice to show cause-cum-demand dated 26.04.2018 was set aside.

14. In the meanwhile, excise audit was again conducted around October, 2019 in respect of the records of the petitioner for the period 2015-16 to 2017-18 (upto June 2017) whereupon objection to non-payment of duty under section 4A of the Central Excise Act on the clearance made by Tigaksha was taken. This was communicated to the petitioner vide letter dated 25.10.2019. It was alleged that as principal manufacturer, petitioner had failed to discharge the duty in terms of the provisions of section 4A of the Central Excise Act on the goods cleared by Tigaksha from its factory at Una, Himachal Pradesh. According to the auditors, duty of Rs.44,87,53,889.00 is payable by the petitioner on account of such clearance made during the period 2015-16 to 2017-18 (upto June 2017). 14.1. This was explained to by the petitioner vide letter dated 19.11.2019 requesting the authority to drop the proceeding.

15. As part of pre show-cause notice consultation, a hearing was given to the petitioner on 18.03.2020. Besides making oral submissions petitioner also furnished written submissions.

16. According to the petitioner, such consultation was a mere formality as it is the requirement under circular dated 10.03.2017 of the Central Board of Indirect Taxes and Customs that in cases where the duty allegedly not paid exceeds

Rs.50,00,000.00 an opportunity for pre-show cause notice consultation should be given. This became evident when respondent No.2 issued show cause-cum-demand notice dated 26.05.2020. By the said show cause-cum-demand notice, petitioner was called upon to show-cause as to why the extended period envisaged under sub section (4) of section 11A of the Central Excise Act read with the Taxation and other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31.03.2020 should not be invoked to demand central excise duty evaded by the petitioner; as to why central excise duty amounting to Rs.44,87,53,889.00 being the aggregate of the central excise duty involved should not be jointly and severally demanded and recovered under the proviso to sub section (4) of section 11A of the Central Excise Act being the aggregate central excise duty involved on the suppressed production and clandestine clearances of twin type blades, razor blades, shaving components, blade cartridge collectively effected by the petitioner from and at Una, Himachal Pradesh and cleared during the period from April 2015 to June 2017; as to why interest at the appropriate rate should not be charged and recovered under the provisions of section 11AA of the Central Excise Act read with Rule 8 of the Central Excise Rules, 2002; and as to why penalty should not be imposed on the petitioner under section 11AC of the Central Excise Act.

17. Aggrieved by issuance of the impugned show cause-cum-demand notice, present writ petition has been filed seeking the reliefs as indicated above.

18. This Court by order dated 15.12.2020 had issued notice and passed an interim order to the effect that respondents should not take any further steps pursuant to show cause-cum-demand notice dated 26.05.2020 issued by respondent No.2.

19. An affidavit in reply has been filed by Shri. Binod Bihari Rath, Assistant Commissioner of CGST and Central Excise, Division-VI, Thane Commissionerate. It is stated that petitioner migrated as an assessee from the central excise and services tax legacy laws to Goods and Services Tax (GST) and is registered under GST with the Thane Commissionerate. Office of the Commissioner of CGST and Central Excise, Audit-Thane Commissionerate during the course of excise audit conducted on the records of the petitioner for the period from 01.04.2015 to 30.06.2017 observed that vide a job work conversion agreement dated 01.04.2015 between the petitioner (principal manufacturer) and Tragaksha, petitioner was getting excisable goods assembled and retail packed under job work at Una, Himachal Pradesh by supply of inputs/ components and packing materials required in the said assembly of retail products. The finished goods were transferred from Tigaksha to the petitioner's sale depots wherefrom it was sold by the petitioner under commercial invoices without discharging the due central excise duty under section 4A of the Central Excise Act.

19.1. As the principal manufacturer, petitioner during the audit period sold the job worked finished goods valued at Rs.552 crores from their sale depots without payment of applicable central excise duty specified under section 4A of the

Central Excise Act involving aggregate central excise duty of Rs.44.87 crores. This was pointed out by the auditors whereafter show cause-cum-demand notice dated 26.05.2020 was issued.

19.2. Referring to the statements made in paragraphs 24 and 25 of the show cause-cum-demand notice, it is stated that goods were procured by the petitioner from Tigaksha and sold from its sale depots without payment of central excise duty and hence recoverable under section 11D of the Central Excise Act. Accordingly, a show cause-cum-demand notice was issued to the petitioner on 26.04.2018. The above show cause-cum-demand notice was dropped vide the order in original dated 20.11.2019 passed by the adjudicating authority on the ground that the demand notice was not maintainable as it failed to bring out any evidence to establish that any amount was collected by the noticee (petitioner) as representing duty of excise for section 11D of the Central Excise Act to get attracted. It is contended that the show cause-cum-demand notice dated 26.04.2018 was raised for the period from 2013-14 to June 2017 on the basis of CERA objection which was in turn based on loan licensee agreement dated 25.07.2012 between the petitioner and Tigaksha as against the instant audit objection based on job conversion agreement dated 01.04.2015 between the same parties. The modification and development under the new agreement which resulted in the change of status of Tigaksha from a loan licensee to that of job worker and the consequent change in the onus of discharge of central excise liability from the licensee manufacturer (Tigaksha) to the principal manufacturer (petitioner) was never disclosed by the petitioner to the department. Till the time show cause-cum-demand notice dated 26.04.2018 was issued, the department was only privy to the facts covered under the licensee agreement dated 25.07.2012 based on which the show cause-cum-demand notice dated 26.04.2018 was issued. Unknown and undeclared to the department with effect from 01.04.2015, the modalities of the operations and status of Tigaksha was converted from a licensee to that of a job work contractor. Till the conduct of the revenue audit in October 2019, the department was not privy to such significant material facts which were suppressed and never declared to the department by the petitioner.

19.3. Referring to the show cause-cum-demand notice dated 26.04.2018, it is submitted that the same was based upon loan licensee agreement dated 25.07.2012 for amounts collected by the petitioner representing its central excise duty and not central excise duty per se which is proposed to be demanded under the impugned show cause-cum demand notice. Thus, the earlier show cause-cum-demand notice and principle of res-judicata would not come into play in so far the impugned show cause-cum-demand notice is concerned. Since there is a clear, distinct and deliberate mis-statement and suppression of facts by the petitioner, it is contended that the impugned show cause-cum-demand notice is not barred by limitation in view of section 11A(4) of the Central Excise Act read with the Taxation and other laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31.03.2020.

19.4. Referring to Rule 10A(ii) of the Valuation Rules, it is stated that contrary to the contention of the petitioner it is the principal manufacturer who has to discharge the central excise liability.

19.5. In the circumstances, it is contended that the writ petition is devoid of merit and therefore, should be dismissed.

20. Petitioner has filed rejoinder affidavit reiterating the averments made in the writ petition. It is asserted that central excise duty is once again sought to be demanded on the very same goods manufactured and cleared by Tigaksha which was the subject matter of dispute in the previous show cause- cum-demand notice dated 26.04.2018. Denying that petitioner has evaded central excise duty, it is submitted that provisions of sub section (4) of section 11A of the Central Excise Act has no application in the present case. The same is without jurisdiction and against settled position of law. Allegations of the respondents that petitioner has resorted to mis-representation has been denied.

20.1. A plain reading and comparison of the earlier show cause-cum-demand notice dated 26.04.2018 and the impugned show cause-cum-demand notice dated 26.05.2020 would go to show that excise duty is sought to be once again demanded on the same goods manufactured by Tigaksha on the same set of facts. Department was aware of the agreement dated 01.04.2015 even prior to issuance of the earlier show cause-cum-demand notice dated 26.04.2018.

20.2. Referring to the earlier show cause-cum-demand notice dated 26.04.2018 and the order passed thereafter it is contended that there is a clear finding by respondent No.3 that he had no jurisdiction to demand duty under section 11A(4) of the Central Excise Act. There is no fraud, collusion, willful mis-statement or suppression of facts by the petitioner. That being the position the extended period of limitation covered by sub section (4) of section 11 of the Central Excise Act cannot be invoked and therefore the impugned show cause-cum-demand notice is barred by limitation.

20.3. It is submitted that invocation of Rule 10A of the Valuation Rules itself is evident of the fact that the goods are manufactured by Tigaksha as the job worker and the duty is to be paid by Tigaksha; duty is not to be paid by the petitioner as Rule 10A of the Valuation Rules does not provide that the supplier of raw material i.e., the petitioner is liable to pay duty on the goods manufactured by the job worker.

20.4. Denying all allegations made by the respondents, it is submitted that there is merit in the writ petition, which should therefore be allowed with cost.

21. Mr. Prakash Shah, learned counsel for the petitioner at the outset has taken us to the earlier notice to show cause-cum-demand dated 26.04.2018 and submits that the said notice was issued on the premise that maximum retail price of the goods cleared by Tigaksha and goods cleared from other plants of the petitioner were the same. Therefore, a view was taken that the goods

manufactured at Tigaksha though exempted from payment of excise duty in view of the exemption notifications and cleared without payment of duty included the duty element in the maximum retail price which were recovered from the ultimate consumers. It was held that petitioner was recovering excess excise duty without passing on the benefit of exemption to the ultimate consumers. The excess recovery was required to be deposited with the government along with interest which was not done. Therefore, respondent No.3 took the view that petitioner had contravened the provisions of sub section (1A) of section 11D of the Central Excise Act. It was noted that had CERA not audited the records of the petitioner, the relevant facts would have remained unnoticed. Following CERA objection, respondent No.3 held that excise duty was recoverable under section 11A(4) and 11D of the Central Excise Act along with interest under section 11AA of the said act. He submits that in the said notice to show cause-cum-demand, respondent No.3 had taken the view that since petitioner had contravened the provisions of the Central Excise Rules, 2002 by clearing goods without payment of appropriate central excise duty and by not disclosing the same to the central excise department with an intention to evade payment of duty had rendered itself liable to penalty under section 11AC of the Central Excise Act and Rule 25 of the Central Excise Rules, 2002. In the circumstances, by the said notice petitioner was asked to show cause as to why central excise duty amounting to Rs.82,02,22,391.00 covering the period from 2013-14 to 2017-18 (upto June 2017) should not be demanded and recovered under section 11A(4) and section 11D(2) of the Central Excise Act besides levy of interest and imposition of penalty.

21.1. Mr. Prakash Shah has also highlighted the reply given by the petitioner to the above notice to show cause-cum-demand. He submits that in the said reply, petitioner had submitted details of show cause notices issued to Tigaksha by the Principal Commissioner, Central Excise and Services Tax, Chandigarh-1 and also questioned the jurisdiction of respondent No.3 to issue the said notice to show cause-cum-demand, besides contending that petitioner would not be covered by section 11A of the Central Excise Act in respect of the goods manufactured by the job worker of Tigaksha. In this connection, learned counsel for the petitioner submits that objections of the petitioner to issue of notice to show cause-cum-demand dated 26.04.2018 were upheld by respondent No.3 vide order dated 20.11.2019. A categorical finding of fact was recorded by respondent No.3 that the goods in question were manufactured by Tigaksha at Himachal Pradesh and not within the jurisdiction of its office. Further it was held that the said notice to show cause-cum-demand was premised on the notion that since the goods were covered under maximum retail price, therefore, incidence of central excise duty was included in the maximum retail price. Though exemption was claimed from payment of central excise duty by virtue of the exemption notifications, even then central excise duty was collected since the maximum retail price was not lowered. Other than this notion, there was no evidence in the demand notice to establish that any amount was collected by the petitioner as representing duty of

excise. Therefore, respondent No.3 held that provisions of section 11D of the Central Excise Act would not be attracted in the present case. Consequently, the notice to show cause-cum-demand dated 26.04.2018 was set aside.

21.2. Referring to the order dated 20.11.2019, Mr. Prakash Shah submits that this order has attained finality. Though under section 35E of the Central Excise Act the committee of commissioners could have directed respondent No.3 to apply to the Central Excise and Service Tax Appellate Tribunal (CESTAT), no such exercise was carried out; therefore the matter has attained finality. Viewed in the above context, it was not open to respondent No.2 to have issued the impugned show cause-cum-demand notice dated 26.05.2020. Therefore, the impugned show cause-cum-demand notice is clearly hit by the principle of res-judicata. On a comparison of the two show cause notices, he submits that both the notices are identical and there is no difference between the two show cause notices on facts.

21.3. In support of his contention that the impugned show cause-cum-demand notice is hit by the principle of res-judicata, he has placed reliance on a decision of this Court in Union of India Vs. East and West Shipping Agency, 2010 (253) E.L.T. 12.

21.4. Mr. Prakash Shah, learned counsel for the petitioner has specifically drawn our attention to Notification No.13/2017 dated 09.06.2017 issued by the Central Board of Excise and Customs demarcating territorial jurisdiction of the Principal Chief Commissioners and Chief Commissioners in India. He submits therefrom that Chief Commissioner, Chandigarh has jurisdiction over Commissioner, Shimla who in turn has jurisdiction over the entire State of Himachal Pradesh. Commissioner, Thane is under the jurisdiction of Principal Chief Commissioner, Mumbai and is confined to areas falling under Thane Metropolitan areas in the State of Maharashtra. Therefore, respondent No.2 cannot have territorial jurisdiction over manufacturing activities of Tigaksha at Una, Himachal Pradesh. On the ground of lack of territorial jurisdiction itself impugned show cause-cum-demand notice is liable to be appropriately interfered with.

21.5. Mr. Prakash Shah submits that the taxable event for central excise is the manufacture of excisable goods. Where manufacture takes place, liability to excise duty is attracted. Sale or ownership of the product is absolutely irrelevant for the purpose of the taxable event under central excise. To support this contention, he has placed reliance on a decision of the Supreme Court in Collector of Central Excise, Baroda Vs. M. M. Khambatwala, 1996(84) ELT 161 as well as on a decision of this Court in Commissioner of Central Excise and Customs Vs. Mahyco Seeds Limited, 2005(182) ELT 163 (Bom).

21.6. Learned counsel for the petitioner further submits that Commissioner of Central Excise, Chandigarh had issued several show cause notices to Tigaksha proposing to deny benefit of exemption by levying appropriate central excise duty. This is being contested by Tigaksha. For the same cause of action, parallel

proceedings cannot be initiated against the petitioner by the Thane commissionerate. Additionally, he submits that there is no fraud or collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of the Central Excise Act with the intent to evade payment of duty by the petitioner. Therefore, it would not be open to respondent No.2 to invoke the provisions of section 11A(4) of the Central Excise Act.

21.7. He therefore submits that the impugned notice to show cause-cum-demand being totally without jurisdiction and non est in law is liable to be set aside and quashed.

22. Mr. Pradeep S. Jety, learned senior counsel for the respondents at the outset submits that challenge made by the petitioner is to a show cause notice. He submits that petitioner should comply with the show cause notice and convince the authority that the said notice has been erroneously issued. For that invoking the writ jurisdiction of this Court under Article 226 of the Constitution of India is unwarranted. Petitioner will be provided all procedural safeguards in the adjudication process. If for any reason, the adjudicatory process results in an order adverse to the petitioner, the same can be assailed before the appellate forum. In such circumstances, petitioner should be relegated to the forum of adjudicating authority rather than availing the remedy of writ jurisdiction.

22.1. Mr. Pradeep S. Jetly has extensively referred to the reply affidavit filed by the respondents and has justified issuance of the impugned show cause-cum-demand notice. He therefore submits that there is no merit in the writ petition which should accordingly be dismissed.

23. Submissions made by learned counsel for the parties have been duly considered.

24. At the outset, it would be apposite to deal with the first notice to show cause-cum-demand dated 26.04.2018. Referring to CERA audit, it was stated that valuation of the goods manufactured was based on maximum retail price under section 4A of the Central Excise Act which consist of all elements of cost and margins including duties and taxes. Referring to Explanation-1 to section 4A, it was mentioned that retail sale price would mean the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer which would include all taxes, local or otherwise, freight, transport charges, commission payable to dealers and all charges towards advertisement, delivery, packing, forwarding and the like and the price being the sale consideration for such sale. The functional relationship between the petitioner and Tigaksha was described as follows :-

"3. The assessee has a related job-worker M/s. Tigaksha Metalics Pvt. Ltd. (TMPL) in the state of Himachal Pradesh enjoying area based exemption. As per the agreement, the assessee provides raw materials to M/s. TMPL and gets finished goods i.e. safety blades and shaving systems manufactured. The finished goods after printing with MRP are cleared without payment of duty to the

various depots of the assessee from where they are sold in the market. The assessee also manufactures similar goods from Thae and other plants on which excise duty is payable. It was observed that the MRP of the goods cleared by M/s. TMPL and by other plants of the assessee were same. Thus it was apparent that the goods manufactured at M/s. TMPL, though exempted and cleared without payment of duty, included the duty element in the MRP was recovered from the ultimate consumers."

24.1. Thus, it was observed that maximum retail price of the goods cleared by Tigaksha which enjoys area based exemption and those cleared from other plants of the petitioner were the same. Therefore, it was apparent that goods manufactured at Tigaksha though exempted and cleared without payment of duty, included the duty element in the maximum retail price which were recovered from the ultimate consumers. From the CERA audit report, it was noted that petitioner was recovering the excess excise duty without passing on the benefit of exemption to the ultimate consumers. Though this excess recovery was required to be deposited to the central government along with the interest, the same was not done. Respondent No.3 also referred to the explanations given by the petitioner to CERA and thereafter observed that had CERA not audited the records of the petitioner all these facts would have remained unnoticed. The allegation against the petitioner in addition to what has been extracted above was summed up in the following manner :-

"4. In accordance with the provisions of sub-section (1A) of Section 11D of Central Excise Act 1944, every person who has collected any amount in excess of duty assessed or determined and paid on any excisable goods or has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or chargeable to nil rate of duty from any person in any manner, shall forthwith pay the amount so collected to the credit of Central Government. As per the general exemption applicable to the industries in the state of Himachal Pradesh, the assessee is claiming full exemption from payment of excise duty for the goods manufactured in the state of Himachal Pradesh.

5. It was also observed by CERA from the cost data of the assessee submitted to the Ministry of Corporate Affairs (MCA) for the year 2013-14 that there was excess recovery of the duty to the tune of Rs.5 Crores. This showed that the assessee was recovering the excess excise duty more than that paid to the government without passing on benefit of exemption to the ultimate consumers. This excess recovery was required to be deposited to the government along with interest as per the above stated provisions which was not done. Therefore, it appears that the assessee has contravened the provisions of sub-section (1A) of section 11D of Central Excise Act 1944. Had the CERA not audited the assessee's records, these facts might have remained unnoticed. The assessee at no point of time has informed the foregoing facts to the department."

24.2. Therefore, petitioner was asked to show cause as to why central excise duty amounting to Rs.82,02,22,391.00 payable during the period from 2013-14

to 2017-18 (upto June 2017) should not be demanded and recovered under section 11A(4) and section 11D(2) of the Central Excise Act besides levy of interest and imposition of penalty.

25. Petitioner submitted detailed reply dated 27.08.2019 to the notice to show cause-cum-demand dated 26.04.2018. Petitioner was also heard.

26. Respondent No.3, being the adjudicating authority, vide the order-in-original dated 20.11.2019 summed up the admitted facts in the following manner :-

"6. The noticee was engaged in manufacturing of excisable goods. They were getting the same manufactured on job work basis from job workers located at places where area based exemption was available. The excisable goods were covered under MRP based valuation as per provisions of section 4A of the Central Excise Act, 1944. The excisable goods which were manufactured at locations which were covered under area based exemption and thus cleared without payment of central excise duty were then sold by the noticee under their brand at the same MRP as that of goods manufactured and cleared by them on payment of central excise duty. These are admitted facts and there is no dispute regarding the same."

26.1. Contention of the respondents were also summed up as follows :-

"8. It is the contention of the demand notice that since the goods were manufactured and cleared from factories which were availing area based on exemption, therefore, the MRP of such goods should have been less than those manufactured and cleared on payment of duty and by not reducing the MRP, the noticee had effectively collected the element of central excise duty which was included in the MRP from the customers, and hence, the same is recoverable under section 11D of the Central Excise Act, 1944. * * * * "

26.2. After examining the provisions of section 11D of the Central Excise Act, respondent No.3 found that there was nothing on record to show that the amount collected was being collected as duty of excise. The entire contention of the respondents was based on the premise that since the maximum retail price of the goods was the same as those manufactured elsewhere central excise duty was included thereunder and collected from the consumers.

However, it was found that there was no evidence to establish that such amount was collected by the petitioner as representing duty of excise. Therefore, section 11D of the Central Excise Act would not be applicable. Further, as a matter of fact, it was found by respondent No.3 that the goods in question were manufactured by Tigaksha at Himachal Pradesh which was outside the territorial jurisdiction of respondent No.3. On the above two grounds, the notice to show cause-cum-demand dated 26.04.2018 was set aside by respondent No.3 vide the order dated 20.11.2019. Relevant portion of the order dated 20.11.2019 reads as under :-

"9. On perusal of the provisions of section 11D, *ibid*, it is clear that any amount

which has been collected as representing duty of excise is required to be deposited to the credit of central government by such person who has collected the amount. In the instant case, there is nothing on record to show that the amount collected was collected as being 'duty of excise'.

10. As per provisions of section 11D of the Central Excise Act, 1944, the amount collected as central excise duty is required to be deposited with the central government by a person who has collected such amount. In the instant case, it has been alleged that the amount was collected by the noticee, and hence, on the basis of this allegation, the demand is issued by the appropriate jurisdictional authority of the noticee company. It is not alleged that M/s. Tigaksha Metallica Pvt. Ltd. had collected any amount as being central excise duty, and therefore, the jurisdiction as per location of M/s. Tigaksha Metallica Pvt. Ltd. is immaterial. It is seen from the demand notice, that provisions of section 11A(4) of the Central Excise Act, 1944 have also been invoked to demand this amount. On perusal of the demand notice it is seen that the goods in question were manufactured by M/s Tigaksha Metallica Pvt Ltd at Himachal Pradesh and not in the jurisdiction of this office. Hence, the demand is not maintainable even under the provisions of section 11A(4) of the Central Excise Act, 1944.

11. The demand notice however, fails to bring out any evidence to establish that an amount was collected by the noticee as 'representing duty of excise'. The provisions of section 11D of the Central Excise Act, 1944 get attracted only in the event of a person collecting any amount as representing duty of excise but not deposited to the treasury. The demand notice is based on notion that since the goods were covered under MRP, therefore, incidence of central excise duty was included in the MRP and as a result of such inclusion, whenever, exemption was claimed from payment of central excise duty by virtue of exemption notification, then the incidence of central excise duty was collected since the MRP was not lowered. Besides, this notion, there is no evidence in the demand notice to establish that the amount was collected by the noticee as representing duty of excise. Hence, the provisions of section 11D of the Central Excise Act, 1944 are not attracted in the present case. The demand notice is, therefore, not maintainable for this reason alone."

27. Having noticed the above, we may now advert to the impugned show cause-cum-demand notice dated 26.05.2020 issued by respondent No.2. Referring to clause (8) of the job work conversion agreement dated 01.04.2015 between the petitioner and Tigaksha, it has been observed that petitioner was getting excisable goods i.e. safety razor blades etc. assembled and retail packed at Tigaksha in Himachal Pradesh by supply of inputs/components and packing materials required in the said assembly of consumer retail products. However, harping on clause (8), it is stated that at no stage of the job work conversion of the said excisable goods were the title of the goods ever stood transferred. The ownership and all other rights in the product continued to remain with the petitioner. Till such time the retail packed blades were not sold from the sales

depot of the petitioner, petitioner as the principal manufacture had the responsibility of discharging the liability in respect of central excise duty leviable and payable on the following products which had not been discharged by the petitioner from the inception of the job conversion agreement dated 01.04.2015 i.e. from April 2015 to June 2017. Since the goods were cleared/sold from the sales depot of the petitioner under commercial invoices without payment of applicable central excise duty specified under section 4A of the Central Excise Act involving an aggregate central excise duty of Rs.44,87,53,889.00, audit objection was raised. Thereafter reference has been made to the submissions made by the petitioner to the audit observations whereafter it has been remarked that there is no dispute that the principal manufacturer and brand holder of the goods in question is the petitioner. This factum is not disturbed in terms of the job conversion agreement dated 01.04.2015 wherefrom it is contended that with effect from 01.04.2015 petitioner is the principal owner of the goods manufactured and Tigaksha is the job worker in respect of the goods in question.

27.1. Regarding the objection raised by the petitioner that in view of the decision of respondent No.3 dated 20.11.2019 the impugned notice to show cause-cum-demand has become untenable in law on the touchstone of the principle of res-judicata, respondent No.2 has negated the same on two grounds. Firstly, referring to the notice to show cause-cum-demand dated 26.04.2018, it has been pointed out that the same was issued without prejudice to any other action that might be taken against the recipient of the notice. Secondly, the notice to show cause-cum-demand dated 26.04.2018 covered the period from the year 2013-14 to June 2017 on the basis of CERA objection which was in turn based on loan licensee agreement dated 25.07.2012 between the petitioner and Tigaksha whereas the impugned notice to show cause-cum-demand is on the basis of CERA audit objection which in turn is based on the job work conversion agreement dated 01.04.2015. Facts and circumstances leading to the issuance of the two notices are distinct and different. Alleging that there was contravention of relevant provisions of the Central Excise Act and Central Excise Rules, 2002 through willful suppression of actual facts and circumstances with an ulterior motive to evade payment of central excise duty, sub section (4) of section 11A of the Central Excise Act has been invoked to avail the extended period of limitation. Consequently, petitioner has been asked to show cause as to why central excise duty amounting to Rs.44,87,53,889.00 being the aggregate central excise duty involved on the suppressed production and clandestine clearance of twin type blades, razor blades, shaving components etc. collectively affected by the petitioner from and at Una, Himachal Pradesh during the period from April 2015 to June 2017 should not be demanded and recovered from the petitioner along with interest thereon and imposition of penalty.

28. A comparison of the first notice to show cause-cum-demand dated 26.04.2018 and the impugned show cause-cum-demand notice dated 26.05.2020 would go to show that the basic premise for issuing the notices remained the same. According to the respondents, petitioner was getting

excisable goods i.e. safety razor blades etc. assembled and retail packed by Tigaksha at its factory in Una, Himachal Pradesh by supply of inputs/components and packing materials required in the said assembly of consumer retail products. While issuing the impugned show cause-cum-demand notice, respondent No.2 placed heavy reliance on clause (8) of the job work conversion agreement dated 01.04.2015 which reads as under :-

"the ownership and all other rights in the product, other materials and work in progress shall always remain with SPCPL".

29. On this basis, it is asserted that ownership of the goods continued to remain with the petitioner till such time the retail packed blades were not sold from the sales depot of the petitioner. Therefore, petitioner was the principal manufacturer of the goods and as such had the responsibility to discharge the liability in respect of central excise duty leviable and payable on the final products under section 4A of the Central Excise Act which had not been discharged by the petitioner.

30. Before we analyze the correctness of the above proposition, it would be apposite to have the comparative statements of details of finished goods and the proposed excise duty leviable covered by the two show cause notices. As per Annexure-A appended to the notice to show cause-cum-demand dated 26.04.2018 the value of the goods in question and the duty liability were as follows :-

Year

Value (Rs)

Duty liability (Rs)

Total Duty (Rs)

Basic

EC

HEC

2013-14

1,39,37,25,166

16,72,47,020

33,44,940

16,72,470

17,22,64,431

2014-15

1,65,23,47,212
19,82,81,665
39,65,633
19,82,817
20,42,30,115
2015-16
1,64,41,06,142
19,72,92,737
39,45,855
19,72,927
20,32,11,519
2016-17
1,53,51,55,302
18,42,18,636
36,84,373
18,42,186
18,97,45,195
2017-18 (Upto June 2017)
41,07,69,666
4,92,92,360
9,85,847
4,92,924
5,07,71,131
TOTAL
6,63,61,03,488
79,63,32,419
1,59,26,648
9,63,324
82,02,22,391

30.1. On the other hand, as per the impugned show cause-cum-demand notice

dated 26.05.2020 the value of the goods and duty liability have been worked out as under :-

STATEMENT SHOWING JOB WORK CONVERSION OF MRP GOODS CLEARED FROM UNA AND SOLD FROM VARIOUS SPCPL SALES DEPOT IN INDIA WITHOUT PAYMENT OF CE DUTY U/S 4A OF CEA

FY

MRP (Rs.)

Assessable Value (Rs.)

Total Duty @ 12.5% (Rs.)

2015-16

2,52,93,94,065

1,64,41,06,142

20,55,13,268

2016-17

2,36,17,77,388

1,53,51,55,302

19,18,94,413

2017-18 (06/17)

63,19,53,332

41,07,69,666

5,13,46,208

Total

5,52,31,24,785

3,59,00,31,110

44,87,53,889

31. From a comparison of the two statements as extracted above, a view may be taken that to enable the respondents from availing the extended period of limitation of five years under sub section (4) of section 11A of the Central Excise Act, the period covered by the impugned show cause-cum-demand notice has been curtailed by excluding the years 2013-14 and 2014-15.

32. Be that as it may, at this stage, we may briefly refer to some of the relevant provisions of the Central Excise Act. The word "factory" is defined under section 2(e) of the Central Excise Act to mean any premises, including the precincts

thereof, wherein or in any part of which excisable goods are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on. The word "manufacture" is defined in clause (f) of section 2. Amongst others, "manufacture" includes any process incidental or ancillary to the completion of a manufactured product. However, it may not be necessary for us to delve deep into what constitutes a manufacturing process. This is because respondent No.3 in his order in original dated 20.11.2019 had recorded a categorical finding of fact that the goods in question were manufactured by Tigaksha at Himachal Pradesh.

33. Valuation of excisable goods with reference to retail sale price is dealt with in section 4A. As per Explanation-1 to section 4A, retail sale price means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges etc. and the price is the sole consideration for such sale. Section 11A deals with recovery of duties not levied or not paid or short levied or short paid or erroneously refunded. As per sub section (1), such recovery can be made by the concerned central excise officer within one year from the relevant date, if it is not a case of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of the Central Excise Act or of the rules made thereunder with intent to evade payment of duty. However, under sub section (4), the limitation extends to five years, if such non-levy or non-payment or short levy or short payment etc. is by reason of fraud, collusion etc.. Under section 11D, every person who is liable to pay excise duty under the Central Excise Act or the rules made thereunder and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods shall forthwith pay the amount so collected to the credit of the central government.

34. Supreme Court in *Empire Industries Ltd. Vs. Union of India*, 1985 (20) E.L.T. 179 had held in categorical terms that the taxable event for central excise is the manufacture of excisable goods. The moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whether be it the result of one process or several processes "manufacture" takes place and liability to duty is attracted. The sale or the ownership of the end-product is absolutely irrelevant for the purpose of the taxable event under central excise which is manufacture.

35. The above view taken in *Empire Industries Ltd.* (supra) was affirmed by a constitution bench of the Supreme Court in *Ujagar Prints Etc. Vs. Union of India*, 1988 (38) E.L.T. 535 by holding that the view taken in *Empire Industries Ltd.* (supra) is an eminently plausible view and does not suffer from any fallacy. It does not call for any reconsideration.

36. Subsequently, in *Collector of Central Excise, Baroda, Vs. M. M. Khambhatwala*, 1996 (84) ELT 161, Supreme Court while reiterating the above proposition held

that even though sale proceeds may go to the respondents that would not alter the character of manufacture. In the facts of that case, it was held as under :-

"7. We have considered the submissions advanced before us by the learned counsel on both the sides. We find force in the arguments of the learned counsel for the respondents : on the admitted facts which we will set out immediately the respondents cannot be considered as manufacturers of agarbatti, amlapodi and dhup etc. manufactured in the premises of house-hold ladies as described above without the aid of power. The undisputed facts are that the respondents supplied raw materials for rolling incense sticks etc. to outside manufacturers and paid wages to them on the basis of number of pieces manufactured. Such manufacture was without the aid of power. There was no supervision over the manufacture. Incense sticks were put in packets and such packets were sold from the premises of the house-hold ladies and they did not go to the factory premises of the respondents. No doubt the sale proceeds went to the respondents but that will not change the character of manufacture. If the conclusion is that the house- hold ladies were the real manufacturers then the decision of the Tribunal cannot be faulted. CEGAT after considering the materials before it concluded that the respondents are not the manufacturers of agarbatti, amlapodi, dhup etc.. manufactured by various cottage type manufacturers on job work basis. On the facts narrated above, we do not think that the assumption of the Collector that the respondents got the goods in question manufactured by 'hired labourers' can be sustained. On the other hand we find, on the facts, the house-hold ladies are the manufacturers of the goods in question and the liability to excise duty will be attracted on their manufacture of the goods and therefore, it cannot be clubbed with the goods manufactured in the factory premises of the respondents to deny the exemption claimed."

37. Undoubtedly, manufacturing process of the goods in question was carried out by Tigaksha at its factory at Una, Himachal Pradesh and in so far central excise is concerned, the taxable event is manufacture of the goods. Concepts like ownership, title holder, ultimate manufacturer etc. have no bearing on the taxable event.

38. Reverting back to the order in original dated 20.11.2019, respondent No.3 had recorded a clear finding of fact that since the goods in question were manufactured by Tigaksha at Himachal Pradesh, it was beyond the jurisdiction of the Thane Commissionerate to demand central excise on such manufacture. Both the findings i.e. that the goods in question were manufactured by Tigaksha at Himachal Pradesh and that such manufacturing process was beyond the jurisdiction of Thane Commissionerate have not been challenged by the respondents and thus have attained finality. As alluded to by the petitioner, Central Board of Excise and Customs has vested territorial jurisdiction upon various central excise officers vide Notification No.13/2017 dated 09.06.2017. From the said notification, it is evident that Commissioner of Central Excise, Shimla has territorial jurisdiction over the entire State of Himachal Pradesh. He

in turn is under the administrative jurisdiction of Chief Commissioner, Chandigarh. On the other hand, Commissioner, Thane who is under the administrative jurisdiction of Principal Chief Commissioner, Mumbai has territorial jurisdiction over the areas falling under the following pin-codes which are in the State of Maharashtra :-

"The areas falling under following pin codes: 400066, 400067, 400068, 400091, 400092, 400101, 400103, 400601, 400602, 400604, 400605, 400606, 400609, 400610, 400613, 400616, 401101, 401104 to 401107."

39. Therefore, it is evidently clear that the taxable event i.e. manufacture of the goods in question had taken place in the factory premises of Tigaksha at Una in Himachal Pradesh. Thus, neither respondent No.2 nor respondent No.3 has the territorial jurisdiction to issue any notice to show cause-cum-demand for levy of central excise duty on such products.

40. Though on this point itself a clear conclusion can be reached that the impugned show cause-cum-demand notice dated 26.05.2020 is without jurisdiction, we may also add that in the order in original dated 20.11.2019 the adjudicating authority had recorded a clear finding that the only presumption for the demand was that because the maximum retail price of the goods manufactured at Una, Himachal Pradesh and those manufactured elsewhere by the petitioner, which included excise duty, were the same, therefore the maximum retail price of the goods manufactured at Una, Himachal Pradesh included central excise duty which were collected from the ultimate consumers but not deposited in the government treasury. Negating the fallacy of this presumption the adjudicating authority held that other than such a presumption, there was no evidence at all to establish that any amount was collected by the petitioner as representing duty of excise. In such a case, provisions of section 11D of the Central Excise Act would not be applicable. This again is a conclusive finding of fact which has remained undisturbed.

41. In view of the conclusions reached on the above two aspects, it may not be necessary to dilate on the other aspects of the challenge made.

42. Consequently and in the light of the discussions made above, we are of the opinion that the impugned show cause-cum-demand notice dated 26. 05.2020 is clearly without jurisdiction and is an attempt to reopen an issue which was concluded by the adjudicating authority vide the order in original dated 20.11.2019 which is not permissible

43. That being the position, the impugned show cause-cum-demand notice dated 26.05.2020 is hereby set aside and quashed.

44. Writ petition is accordingly allowed. However, there shall be no order as to cost.