

(1990) 08 AHC CK 0008

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 390 of 1982

Triveni Sheet Glass Works Ltd.

APPELLANT

Vs

Collector of C. Ex. and Cus.

RESPONDENT

Date of Decision : 16-08-1990

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 11B, 35A, 35A(2)
Companies Act, 1956 — Section 370(IB)
Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 11B, 35A, 35A(2)
Companies Act, 1956 — Section 370(IB)
Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 11B, 35A, 35A(2)
Companies Act, 1956 — Section 370(IB)

Citation : (1991) 54 ELT 44

Hon'ble Judges : B.P. Jeevan Reddy, C.J.;R.A. Sharma, J

Bench : Division Bench

Advocate : Sunil Gupta, for the Appellant; N.B. Singh and Ashok Mohiley, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Jeevan Reddy, C.J.—This writ petition is filed questioning the validity of a show cause notice dated 22-5-1982 issued by the Collector, Central Excise, Allahabad, u/s 35A of the Central Excise Act - as it stood at the relevant time.

2. The petitioner Triveni Sheet Glass Works Ltd. is engaged in the manufacture of sheet glass. Sheet glass is subjected to excise duty under Schedule I to the Act. The petitioner commenced production in January, 1976. For selling its products it established its own depots in several cities of the country. Some sales were also effected at the factory. In the year 1976, the petitioner submitted a price list for approval, in which he disclosed the wholesale cash price for each of its sale depots separately. He wanted different wholesale price to be fixed for goods sold at each of its depots. The petitioner was called upon to furnish certain material relating to cost of production, sale vouchers issued by the depots, sale price at the factory and so on. On a consideration of the material furnished by the

petitioner, the Collector, Central Excise directed that since some goods were sold at the factory gate itself, the price charged at the gate shall be the wholesale cash price. Accordingly, the Assistant Collector called upon the petitioner through his letter dated 18-5-1976 to file a fresh price list, which the petitioner did under protest. He requested the Assistant Collector either to revise his order or to pass an appellate order so as to enable him to pursue the remedy of appeal. The Assistant Collector replied that his letter dated 18-5-1976 may be treated as an appellate order. The petitioner, however, did not file any appeal or pursue the matter further. He submitted to the directions of the Assistant Collector and furnished the price list on the basis of ex-factory wholesale price, which was provisionally approved by the Assistant Collector through his letter dated 5-7-1976. The petitioner was removing the goods and selling them both at the factory gate and also at its depots.

3. A fairly large part of the petitioner's products was sold to a company called Hindustan Safety Glass Works Ltd., Allahabad. Indeed, 22% of the petitioner's products was sold to this company and 3% of the production was sold to certain dealers at the factory gate, while 55% of the products was sold through its depots.

4. On 15-12-1977, the Assistant Collector finally approved the price list, which was provisionally approved earlier (Price List No. 7 of 1976). This price list remained effective till 13-2-1977. Thereafter the petitioner has been submitting different price lists from time to time, the last of which is price list No. 1 of 1981 effective from 2-3-1981 to 18-4-1982. The basis of this price list was the same as the one underlying the price list No. 7 of 1976. The petitioner says that he has been submitting monthly returns of the clearances on form R.T. 12, to which no objection was taken at any point of time. Indeed, final assessments were also made on the basis of the said returns.

5. While so, on 6-5-1981 a show cause notice was issued to the petitioner by the Superintendent (Preventive) I.D.O., Allahabad, calling upon the petitioner to show cause why he should not be made liable to pay excise duty in a sum of Rs. 4,01,36,959.15P, which duty the petitioner had allegedly evaded during the period 1-7-1977 to 30-6-1980. The said show cause notice was accompanied by a large number of documents, as many as 51, including a copy of the "Enquiry Report Regarding Valuation of Glass Sheets of M/s. Triveni Sheet Glass Works Ltd., Allahabad" prepared by the very same Superintendent. The enquiry report ran into 50 pages excluding the annexures appended thereto. The petitioner submitted his explanation to the show cause notice, on a consideration of which and also after giving personal hearing to the petitioner, the Assistant Collector passed orders on 17-6-1981, dropping all further proceedings in pursuance of the show cause notice. The Assistant Collector was of the opinion that there was no occasion for the Superintendent (Preventive) to raise any fresh demand or to allege that the petitioner has evaded duty.

6. On 22-5-1982 the Collector, Central Excise issued the impugned show cause

notice u/s 35A of the Act proposing to revise and set aside the order of the Assistant Collector dated 17-6-1981 and also proposing to confirm the demand of duty, allegedly evaded by the petitioner, in a sum of Rs. 4,01,36,959.15P. Soon upon receiving this notice, the petitioner approached this Court by way of this writ petition, without furnishing an explanation to the notice. At his instance, all further proceedings in pursuance of the impugned notice have been stayed.

7. Sri S.P. Gupta, learned Senior Advocate appearing for the petitioner, assailed the validity of the impugned show cause notice on the following grounds :-

(i) The impugned notice is barred by time, having been issued beyond six months of the order of the Assistant Collector proposed to be revised. Any proceeding in pursuance of such a notice would amount to a clear harassment of the petitioner and must, therefore, be interdicted.

(ii) Inasmuch as the earlier notice issued by the Superintendent (Preventive) on 6-5-1981 u/s 11A of the Act was bad in law, the present notice, seeking to revive and continue the proceedings in pursuance of that notice, is equally bad. There is absolutely no allegation of suppression of facts in the show cause notice issued by the Superintendent (Preventive) on 6-5-1981. In the absence of such an allegation, the notice dated 6-5-1981 was itself barred in respect of the period beyond six months anterior to it.

(iii) Once a price list is approved by the competent authority (Assistant Collector) no demand for additional duty can be raised, nor can an allegation of evasion of duty be made until and unless the approved price list is modified. In this case, no such modification has been effected. Hence the proceedings proposing to levy additional duty are misconceived.

(iv) The proceedings suffer from legal mala fides. No such proceedings u/s 11A are taken for the period prior to 1-6-1977 or for the period subsequent to 30-6-1981, even though the price list submitted for the said anterior and subsequent periods are also based upon the same principle as the one underlying the price list effective for the period concerned herein.

(v) Neither the show cause notice issued previously u/s 11A nor the impugned notice u/s 35A specify what ought to be the wholesale cash price. Unless such price is indicated, the show cause notice is unsustainable in law.

(vi) The several grounds mentioned in the original show cause notice as well as the impugned show cause notice are all irrelevant. None of the grounds set out therein warrant the action proposed. The price at which the sale is effected at the depots or the price at which the purchaser/dealer from the petitioner sells the goods is not relevant for the purpose of determining the wholesale cash price. Even if the sales at the gate of the factory are small, they must constitute the basis for the wholesale cash price, and not the sales elsewhere. Similarly, the assumption underlying the said notices that Hindustan Safety Glass Works Ltd. is a related person is unsustainable in law. The prices at which goods were sold to

Hindustan Safety Glass Works were at "arm's length". No extra commercial consideration was involved therein. Since there is no suppression or failure to disclose on the part of the petitioner at the time when the price list was approved, the very initiation of the proceedings u/s 11A and consequently u/s 35A are totally untenable in law.

8. On the other hand, Sri Markandey Katju, the learned counsel appearing for the Department, contended that the show cause notice u/s 11A was based upon an elaborate inquiry and a voluminous material. The case against the petitioner is that he has by suppression of relevant facts and on the basis of misrepresentations obtained approval of the price list and, therefore, the show cause notice u/s 11A seeking to revise the price list within the permissible period of five years from the date of the said notice is perfectly valid in law. The said show cause notice clearly alleges that there was suppression of relevant facts and misrepresentation. The order of the Assistant Collector dated 17-6-1981 dropping the proceedings u/s 11A was based upon a misapprehension of facts and law and, therefore, the Collector sought to revise and set aside the same under the impugned notice. The impugned notice is neither barred by time, nor can it be said to be without jurisdiction. The petitioner is really seeking a writ of prohibition, which lies only where total want of jurisdiction is made out. No such suggestion can be made in this case. A writ petition against a show cause notice is not at all maintainable. Several legal contentions raised by the petitioner are unsustainable in law; they proceed upon a misapprehension of the true position obtaining under the Act. Disputed questions of fact cannot be gone into in a writ petition. The petitioner must be directed to submit his explanation to the impugned show cause notice and if any order adverse to him is passed, he always has the remedy of appeal and other remedies provided by the Act. The learned counsel also submitted that the Department's case, as set out in the show cause notice u/s 11A, is not that the Hindustan Safety Glass Works Ltd. is a related person but that the transaction of the petitioner with them was not at "arm's length". The show Cause notice and the annexures appended thereto, in particular, the inquiry report, elaborately set out the devices and tricks adopted by the petitioner to have his misleading price lists approved.

9. For a proper appreciation of the contentions arising herein, it is necessary to notice the precise allegations made in the show cause notice dated 6-5-1981 issued u/s 11A of the Act. They are to the following effect:

10. From the inquiry report it is revealed that the petitioner has willfully misstated and suppressed the material facts before the proper officer while seeking approval of price lists during the year 1977 and onwards. The petitioner had declared on the body of the price lists that "The price shown in column 3 is the sole consideration and no other consideration flows or will flow directly or indirectly from our buyer to us". It is admitted by the petitioner that he has charged profit and breakage allowance in respect of sales against which bills have been raised from branch offices without declaring it to the proper officer.

Moreover, the prices should not be based upon personal considerations, but should be uniformly applicable to all customers who decide to purchase at the factory gate. However, the inquiries have revealed that the petitioner has discriminated between wholesale independent buyers in the same class and has refused to supply goods to independent buyers at the approved prices and directed them to contact one or the other of his favoured buyers. In such deals, his favoured buyers/wholesale dealers have charged more than double the approved prices, which indicates the existence of secret dealing between the petitioner and his favoured buyers. Only a small percentage, i.e., less than 4% of the total sale, has been supplied at the factory gate to such buyers with whom the petitioner had secret dealings. In this manner, the petitioner manipulated to get the whole range of his goods assessed at a lower price. Further the Hindustan Safety Glass Works Ltd., to whom the goods have been supplied at a favourably low price, are deemed to be under the same management as contemplated u/s 370(IB) of the Companies Act, 1956. Inquiries have revealed that no industrial buyer of the same class could get the goods from the petitioner at the prices at which such goods were sold to Hindustan Safety Glass Works Ltd. The petitioner has, by adopting the above modus operandi, evaded payment of duty amounting to Rs. 4,01,36,959.15P during the period in question.

11. As stated above, in the list of documents annexed to the notice, as many as 51 documents were referred to. A copy of the inquiry report of the Superintendent (Preventive) IOD, Allahabad, was also enclosed along with several annexures appended thereto. Since the inquiry report forms part of the show cause notice, it would be appropriate, briefly, to refer to the contents of the said report.

12. According to the report, several branch offices established by the petitioner in various cities are managed by the petitioner's own establishment. A scrutiny of the records of one such office, Hyderabad Branch Office, revealed that while the landing cost of the entire stock transfer for a given period was Rs. 49,72,985.86P, it was sold by the Branch Office at a price of Rs. 74,11,743.00, which means an excess price of 50%. In view of the substantial gap in the selling price and the landing cost of the goods, it was felt necessary to study whether the sale to the wholesale dealers of Hyderabad and around constituted subsequent sale or sales at arm's length from the factory itself. The Branch Manager of the Hyderabad Branch Office was summoned and his deposition recorded, which disclosed that prior to November, 1978, the Branch Office did not have even a godown of its own and that the goods transported were directly unloaded at the consignee's godowns. It is thus clear that the Branch Office had been simply functioning as a co-ordinator between the petitioner and the wholesale purchasers. No other service was required for the Branch Office. Only very small quantities were unloaded at the godown of the Branch Office after it was established. Even the wholesale dealers at Hyderabad, who were examined, deposed that they were receiving goods directly from the petitioner's factory and that the unloading charges were also being borne by the petitioner. It is thus

clear that the sale by the Branch Office of the petitioner was really the first sale by the petitioner; there was no sale by the petitioner to the Branch Office. No Sales Tax was paid for any such sale. Wholesale cash price for the purpose of levying duty is the price, which the manufacturer receives from the sale" to first wholesale buyer/dealer, that is, when the goods first enter the stream of trade. Examined from this point of view, sales to wholesale purchasers/dealers by the Branch Office are first sales and the price charged therefore should be treated as the wholesale cash price. In short, the sale to wholesale buyers at Hyderabad should be treated as sale at the factory gate for all practical purposes. It is not necessary that only such sales which have taken place at the factory gate itself should be considered. The result of investigation carried out at Hyderabad was found to be startling and induced the Department to study the basis for the approval of the price list. Accordingly, the Superintendent visited the premises of M/s. Harakh Chand & Sons, a wholesale purchaser from the petitioner. It was found that he was selling goods at double the value on which the duty was paid. Elaborate inquiries were made, which too re-enforced the Department's belief that the price disclosed as the sale price at the gate of the factory was a misleading one. It was further found that the petitioner (Triveni Sheet Glass Works Ltd.) and the bulk purchaser at the gate (Hindustan Safety Glass Works Ltd.) are controlled by the same H.U.F. (Particulars in support of the said allegation were set out). In short, it was pointed out that the same family held 66% of public shares in the petitioner company and 100% share in the Hindustan Safety Glass Works. Further, it was found that the registered office and administrative office of both the companies are situated in the same building at Calcutta and the affairs of both the companies are being looked after from the same office. Same officials attend to the business of both the companies and even telephones and grams are shared together. The staff is common to both the companies. Hyderabad Branch Offices of both the companies are in the same premises and looked after by the same officials. It is significant to note that while Hindustan Safety Glass Works Ltd. are receiving its entire supply of sheet glass from the petitioner at very low prices, similar factories manufacturing toughened glass and mirror glass are receiving the same material at almost double the prices, which is evident from the bills enclosed to the report. The Hindustan Safety Glass was a partnership firm, which was subsequently incorporated into a private limited company closely held by the very same H.U.F. It was also found that the petitioner was refusing to sell goods at the factory gate to other buyers at the price at which goods were sold to Hindustan Safety Glass Works Ltd. and certain other trusted buyers. (Several particulars in support of these allegations are furnished in the report). On the basis of the said elaborate material, the report drew the conclusion that "what apparently appears to be do (does) not depict the true picture. There is a secret understanding between M/s. Triveni Sheet Glass Works Ltd. and their wholesale purchasers similar to that with other manufacturers." After stating several other facts it was alleged that the price list tendered by the petitioner during the relevant period does not satisfy the basic ingredients of Section 4(1)(a) and, therefore, does not represent the real price.

The modus operandi adopted by the petitioner was said to be misleading. It was asserted that the prices at which the goods were sold at the branch offices of the petitioners constituted the wholesale cash price. It is on the said basis that the amount of duty allegedly evaded by the petitioner was arrived at.

13. We do not think it necessary to refer to the findings recorded by the Assistant Collector in his order dated 17-6-1981. Suffice it to say that these findings are in favour of the petitioner. It is the said order, which is sought to be revised by the Collector under the impugned show cause notice. The impugned notice briefly reiterates the allegations made in the show cause notice dated 6-5-1981 and the contents of the inquiry report appended thereto, and on that basis alleges that "the prices declared by the party show a willful mis-statement and suppression of facts." It is further alleged that the petitioner has "willfully mis-stated and suppressed facts and incorrectly declared the values for approval contrary to the declaration given in the price list No. 7/76." It then says that the order of the Assistant Collector dated 17-6-1981 is based on erroneous facts and is not proper, legal or correct. The impugned show cause notice proposes to set aside the order dated 17-6-1981 and to confirm the demand of Rs. 4,01,36,959.15P.

14. It would be appropriate at this stage to refer to the relevant provisions of the Act as they stood at the relevant time. Section 4(1) reads as follows :-

"Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section, be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:"

Clause (c) of Sub-section (4) of Section 4, which defines the expression "related person" reads as follows :-

""related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor.

Explanation - In this clause "holding company", "subsidiary company" and "relative" have the same meaning as in the Companies Act, 1956;"

Sub-section (1) of Section 11A reads thus :

"When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-

paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression-of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words "six months", the words "five years" were substituted.

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

Section 35A may be set out in full. It reads :-

"(1) The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereinafter referred to as the Board), may, of its own motion or otherwise, call for and examine the record of any proceeding in which any decision or order has been passed under the Act or the rules made thereunder by a Collector of Central Excise (not being a decision or order passed on appeal u/s 35) for the purpose of satisfying itself as to the correctness, legality or propriety of such decision or order and may pass such order thereon as it thinks fit.

(2) The Collector of Central Excise may, of his own motion or otherwise, call for and examine the record of any proceeding in which any decision or order has been passed under this Act or the rules made thereunder by a Central Excise Officer subordinate to him (not being a decision or order passed on appeal u/s 35) for the purpose of satisfying himself as to the correctness, legality or propriety of such decision or order and may pass such order thereon as he thinks fit.

(3)(a) No decision or order under this section shall be varied so as to prejudicially affect any person unless such person is given a reasonable opportunity of making a representation and, if he so desires, of being heard in his defence.

(b) Where the Board or, as the case may be, the Collector of Central Excise is of opinion that any duty of excise has not been levied or has been short-levied or erroneously refunded, no order levying or enhancing the duty, or no order requiring payment of the duty so refunded, shall be made under this Section unless the person affected by the proposed order is given notice to show cause against it within the time limit specified in Section 11A.

(4) No proceedings shall be commenced under this Section in respect of any decision or order (whether such decision or order has been passed before or after the commencement of the Customs, Central Excises and Salt Act, 1944 and

Central Boards of Revenue (Amendment) Act, 1978) after the expiration of a period of one year from the date of such decision or order."

15. We shall first take up the question whether the impugned show cause notice (issued by the Collector u/s 35A) is barred by time. This question has to be answered on the language of Section 35A. Sub-section (1) confers upon the Central Board power to revise any decision or order made by the Collector, Central Excise (not being a decision or order passed on appeal u/s 35). Sub-section (2) confers a similar power upon the Collector to revise any decision or order made by a Central Excise Officer subordinate to him (not being a decision or order passed on appeal u/s 35). Sub-section (3) is comprised of two clauses, (a) and (b). Clause (a) says that no decision or order shall be varied to the prejudice of a person unless such person is given a reasonable opportunity of making a representation and, if he so desires, of being heard in his defence. Clause (b) then says that where the Board/Collector is of opinion that any duty of excise has not been levied/short-levied/erroneously refunded, no order levying or enhancing the duty, or no order requiring payment of the duty so refunded shall be made under this section unless the person affected by the proposed order is given notice to show cause against it within the time limit specified in Section 11A. Subsection (4) then says that no proceedings shall be commenced u/s 35A in respect of any decision or order after expiration of a period of one year from the date of such decision or order. The question is whether there is any contradiction between clause (b) of Sub-section (3) and Sub-section (4) and if not, how they should be understood and interpreted? The petitioner's contention is that Section 11A prescribes a time limit of six months. Therefore, where the power u/s 35A is sought to be invoked for levying the duty evaded, or for enhancing the duty in a case where it is short-levied, or for payment of duty erroneously refunded, the proceedings must commence within six months of the decision or order sought to be revised; the power u/s 35A is not an original power like the one u/s 11A; it is only a revisional power; there could be no allegation of fraud or misrepresentation or other grounds mentioned in the proviso to Section 11A(1) in the case of proceedings sought to be revised u/s 35A; hence such proceedings must necessarily commence within six months of the decision or order proposed to be revised. Sub-section (4) provides for cases of the nature other than those mentioned in clause (b) of Sub-section (3). In short, clause (b) of Sub-section (3) provides for a special and shorter limitation in cases where duty is sought to be levied or enhanced or the refunded amount directed to be re-deposited; in other cases Sub-section (4) applies. Two decisions rendered by Delhi and Bombay High Courts are relied upon in this connection besides certain decisions of the CEGAT. On the other hand, the Department submits that Section 11A provides for two periods of limitation, one in the main limb of Sub-section (1) of Section 11A and the other in the proviso thereto. There is nothing to show that only the first of the two limitation periods is imported into Section 35A(3)(b). Both the limitations should be read into the said clause. Subsection (4) merely provides a shorter limit, which means that even

though in cases falling under the proviso to Sub-section (1) of Section 11A, five years period is available, the same is cut down to one year by virtue of Sub-section (4).

16. In our opinion, the interpretation placed by the Department should be accepted. A perusal of Section 35A(3)(b) and Section 11A(1) discloses the similarity of language and the use of the very same expressions. It is evident that both provide for the same situation and constitute motifs of the same pattern. Section 11A is designed in the interest of public revenue just as Section 11B is enacted in the interest of the manufacturer. Section 11A provides that where duty is not paid or short-paid or erroneously refunded, the same can be collected within a period of six months even though such non-levy, short-levy or erroneous refund may not have been occasioned by mis-representation, fraud or suppression of facts on the part of the manufacturer/producer. The proviso, however, says that where such non-levy, short-levy or erroneous refund is the result of fraud, collusion, willful mis-statement, suppression of facts or contravention of any of the provisions of the Act or the rules made thereunder with an intent to evade payment of duty, by such manufacturer/producer or his agent, the period of limitation shall be five years. Proceedings commenced u/s 11A(1), whether under the main limb or under the proviso thereto may be dropped erroneously or illegally. It is to provide for such cases inter alia, that sub-sections (2) and (3) of Section 35A were enacted. In particular, Section 35A(3)(b) is, and must be read as co-extensive with Section 11A. The periods of limitation applicable u/s 11A are equally applicable u/s 35A(3)(b), depending upon the nature of allegations in the show cause notice. Evidently, Sub-section (4) of Section 35A was enacted to provide a shorter period of limitation in the interest of finality of the proceedings under the Act. Even though a longer period of limitation is available u/s 35(3)(b) in cases where the non-levy or short-levy or erroneous refund is occasioned by fraud etc. on the part of the manufacturer/producer concerned, still by virtue of Sub-section (4) such proceedings must be initiated within one year of the decision or order sought to be revised.

17. We are not inclined to agree with the interpretation placed upon the said provisions by the learned counsel for the petitioner, namely, that Section 35A(3)(b) provides special period of limitation of six months for exercise of the power of revision under the said section where it relates to non-levy/short-levy/erroneous refund and that Sub-section (4) applies to other cases. In our opinion, the language of the Section does not admit of such a construction. If the intention of the Legislature was to provide for a shorter period of limitation, namely, six months, in proceedings of the nature referred to in clause (b) of Section 35A(3), nothing was easier than to provide so specifically; it was not necessary to refer to the time limit specified in Section 11A. We also do not see any warrant to construe the reference to Section 11A as a reference to the main limb of Section 11A(1) but not to its proviso. Both the main limb and the proviso are part and parcel of the same sub-section. Such a language was only meant to import both the periods of limitation mentioned in Section 11A into Section 35A(3)(b).

There is yet another reason for not entertaining this plea at this stage. The said period of limitation operates only where an order levying or enhancing the duty or an order requiring payment of the duty erroneously refunded is made. [See the language of Section 35A(3)(b)]. That stage has not yet arrived. We do not know whether any such order would be made or the proceedings will be dropped or merely remanded to the Assistant Collector after setting aside the order dated 17-6-1981. On the language of the said clause (b) the limitation prescribed thereunder would apply only where an order of a particular nature is being passed, and not in other cases. If the Collector merely sets aside the order of the Assistant Collector and remands the matter for a fresh inquiry, the period of limitation specified in the said clause will have no application. In such cases it is only limitation prescribed under Sub-section (4) of Section 35A that would apply and in this case, admittedly, the impugned notice has been issued within one year of the order of the Assistant Collector.

18. Strong reliance is placed by learned counsel for the petitioner upon the decision of a Division Bench of the Delhi High Court in *Associated Cement Companies Ltd. Vs. Union of India*, . A perusal of the facts and reasonings of the said judgment shows that it is wholly distinguishable. It was not a case u/s 11A. The issue there pertained to the question whether "pogzolana cement" manufactured by the petitioner should be subjected to duty at the rate of 91% per metric tonne or 82% per metric tonne in terms of a notification issued under Rule 8. In appeal, the Appellate Collector agreed with the petitioner, which order was sought to be revised by the Central Government u/s 36(2) of the Act. The first proviso to Section 36(2) corresponds to clause (a) of Sub-section (3) of Section 35A, while the second proviso to Section 36(2) corresponds to Sub-section (4) of Section 35A. The third proviso to Section 36(2) corresponds to clause (b) of Sub-section (3) of Section 35A. The notices u/s 36(2) were issued after the expiry of six months of the date of the decision of the Appellate Collector, but within one year thereof. The question was whether such notices were barred by limitation. The Division Bench took the view that the second proviso covers a larger field including the field covered by the third proviso and further that while the second proviso is of a general character, the third proviso is in the nature of a special provision, carving out a particular area from within the larger area covered by the second proviso. Accordingly, the Bench was of the opinion that where the action proposed is of the nature mentioned in the third proviso, proceedings have to be initiated within a period of six months. The Bench was of the further opinion that the words "time limits specified in Section 11A" used in the third proviso should mean a period of six months only for the reason that u/s 36(2) what is sought to be revised is the decision or order of a Central Excise Officer and that it is not an original proceeding like the one u/s 11A. We have already expressed our opinion that if the intention of the Parliament was to provide a period of six months only, nothing was easier than to say so expressly. It was not necessary to refer to the "time limit specified in Section 11A". Further, Section 11A does not specify a single period of limitation,

but to two different periods of limitation. The similarity of the language employed in Section 35A(3)(b) and Section 11A induces us to hold that where an order u/s 11A is sought to be revised, the period of limitation for initiating proceedings u/s 35A would be six months where the proceedings u/s 11A relate to the main limb of Sub-section (1) thereof, and five years where the proceedings are relatable to the proviso to Sub-section (1). Of course, Sub-section (4) of Section 35A cuts down the period of five years in the latter case to one year. It may also be noticed that the structure of Section 36(2) is different from Section 35A. For all the above reasons, not only the decision of the Delhi High Court is distinguishable, but if the said decision is understood as laying down a general proposition applicable u/s 35A as well, we express our respectful disagreement with it.

19. The next decision relied upon is of the Bombay High Court in *Corn Products Co. (India) Ltd. and another Vs. Union of India and another*, . This is also a case arising u/s 36(2). This again is not a case where decision or order rendered u/s 11A was sought to be revised. The issue there was whether the value of the corrugated boxes in which the goods were packed should be included in the value of the products or not. A decision was rendered by the Appellate Collector, which was sought to be revised u/s 36(2). The view expressed by this Bench is on the same lines as that of the Delhi High Court. The approach of the Bench is that the third proviso to Section 36(2) is intended to carve out something from the main provision of the Section and cannot be construed as an independent provision and that while proceedings of a particular nature mentioned in the third proviso are governed by a shorter period of limitation, all other cases fall under the second proviso. Otherwise, it was observed, there will be parallel jurisdictions, which could not have been intended by the Legislature. For the reasons given hereinbefore, this decision is distinguishable and the views expressed therein may not be valid with respect to Section 35A inasmuch as Section 35A(3)(b) is not in the nature of a proviso to Sub-section (4) thereof; it is an independent provision.

20. Learned counsel for the petitioner relied upon certain decisions of the Tribunal, which we do not think it necessary to refer here. Suffice it to say that they follow the approach and reasoning of the decisions of the Delhi and Bombay High Courts.

21. We may reiterate that the plea of limitation is premature. That question will arise only when the final order to be passed proposes to levy or enhance the duty or if it proposes to direct payment of the duty erroneously refunded. It is at that stage that this question would arise. The proceedings may be dropped or the order of the Appellate Collector may be merely set aside and the matters remitted for fresh consideration, in which case the question of limitation would not arise.

22. For all the above reasons, we cannot hold that the impugned show cause notice must be quashed on the ground that it is barred by limitation.

23. We are not impressed by the argument that the original notice u/s 11A itself is bad for the reason that it does not propose to modify the approved price list. We cannot accede to the proposition that until and unless the price list is modified, a proceeding u/s 11A is not maintainable. A reading of the notice u/s 11A shows that according to it, the approval of the price list was vitiated for several reasons mentioned therein and on that basis it has raised a specific demand in the sum of Rs. 4,01,36,959.15P. Similarly, the argument that unless the proposed wholesale cash price is specifically indicated, the show cause notice is bad and equally unacceptable. In any event, the very fact that the show cause notice specifically works out the amount of duty short-paid shows that the Department has worked out the correct duty. If the petitioner felt any doubt in this behalf, he could have sought clarification from the authority.

24. It is not possible to agree with the learned counsel for the petitioner that in the show cause notices, there is no allegation of mis-statement or mis-representation. We have set out hereinbefore the contents of the notice issued u/s 11A as also the contents of the impugned show cause notice. They clearly allege that the petitioner has obtained approval of the price list by mis-representation and by concealing relevant facts. Whether there is in fact any concealment or mis-representation on the part of the petitioner or not, is not a question, upon which we can, or ought to, express an opinion in this writ petition. That is a matter for the authority to go into and pronounce upon at the appropriate stage in pursuance of the show cause notices.

25. Similarly, we need not express any opinion whether Hindustan Safety Glass Works Ltd. is a "related person". Sri Katju for the Department says that it has never been the Department's case. According to him, their case is that the transaction between the petitioner and Hindustan Safety Glass Works Ltd. is not at "arm's length". Whether this allegation of the Department is true or not is a question of fact, upon which too we cannot express any opinion.

26. Mr. Gupta then wanted to argue that none of the several grounds set out in the show cause notice either by itself or considered together warrant action u/s 11A. If each of the grounds is taken by itself without the accompanying allegation of mis-representation or concealment, the learned counsel may be right, but if those facts are looked in the light of the aforesaid allegations, it becomes a question of fact requiring investigation into facts. For the same reason, the relevance or the value to be placed upon the several statements and facts referred to in the original show cause notice and the accompanying annexures is not a matter for us to consider at this stage.

27. We are equally not convinced with the argument of legal mala fides. Merely because no proceedings u/s 11A are taken with respect to the period anterior to 1-6-1977 or subsequent to 30-6-1980 cannot be a ground for quashing the impugned notice. From the year 1982 the position seems to have undergone a change. Even with respect to the period 1980 to 1982, Mr. Katju says, some proceedings have been taken, but then again there is a controversy about the

nature of those proceedings. Be that as it may, the said fact, even if proved, cannot, in our opinion, constitute legal mala fides and cannot be a ground for quashing the impugned notice or, for that matter, the original proceedings u/s 11A.

28. For all the above reasons, the writ petition fails and is accordingly dismissed.

No costs.