

Fenoplast Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Jul-24-1998

Reported in : (1998)(62)ECC730

Judge : Author: V Gulati

Appellant : Fenoplast Ltd.

Respondent : Commissioner of Central Excise

Advocate for Pet/Ap. : Mr. Govind Das

Judgement :

1. These appeals involve a common issue and are, therefore, taken up together for disposal. The duty demand has been raised against the appellants consequent on the issue regarding classification of the appellant's goods being resolved against them by the Hon'ble Supreme Court.

2. The appellants manufactured cloth which is popularly known as rexin cloth and they were paying duty in respect of the same until 1981 under Tariff Heading 19(iii) of the erstwhile Central Excise Tariff. In 1981, the appellants addressed a letter to the authorities on 9.3.81 and sought classification of the same under a heading defferent, from Tariff Heading 19(iii) of he said tariff as according to them this heading did not cover these goods. The appellants thereafter filed a Writ Petition and by the order passed in WMP No. 3225/81 W.P. No.2199/81 dated 3.4.81, the Hon'ble High Court of Andhra Pradesh passed the following order: on condition

that the petitioners pay excise duty under item 19(1) of the First Schedule to the Central Excise and Salt Act and furnish Bank Guarantee for the balance of Excise Duty payable at the rate of 30 per cent the respondent herein namely the Assistant Collector of Central Excise be and hereby are directed not to collect the Excise Duty on the production of the petitioners and permit the petitioners to remove their products from the factory premises.

3. Thereafter the appellants had also filed a classification list on 18.4.81 and which was approved on 30.4.81. This classification list was approved for the coated fabrics which fall under Tariff Heading 19(iii). While passing final orders in the writ petition filed by the appellants vide W.P. No. 2199/81 order dated 18.3.1987 while taking note of the approval of the classification under Tariff Heading 19(iii) on the classification list filed on 18.4.81, the Hon'ble High Court has held as under: The prayer in the writ petition is for the issue of a writ of respondents directing the respondents to decide the objections raised by the 1st petitioner in its letter dated 9.3.1981 and pass orders in accordance with law.

In fact, this should not have created any problem in paragraph 8 of the counter affidavit it has been stated as follows:-- The petitioner's product, therefore, attracts duty under item No. 19(iii) however, the department is prepared to give opportunity to the petitioner and take a decision according to law.

A further development to be noticed is disclosed in paragraph 12 of the counter affidavit dated 24.7.1982. Therein, it is stated as follows:-- With reference to the petitioner's statement under paragraph 16 of the affidavit namely to direct the respondent department to consider the objections raised by the petitioner in his letter dated 9.3.1981, it has to be stated that the petitioner, after sending his letter dated 9.3.1981 submitted a classification list on 18.4.1981 wherein the petitioner's goods were described as "Cotton fabrics coated with artificial and other plastic materials manufactured out of duty paid base cotton fabrics. The said classification list was approved by the 1st respondent on 30.4.1981. The letter dated 9.3.1981 containing the objection is earlier to the classification list submitted on 18.4.1981 with the submission of a classification list on 18.4.1981 the objections raised in an earlier letter does to merit consideration. However, the 1st respondent is prepared

to consider the objections raised by the petitioner in his letter dated 9.3.1981 and pass a speaking order after affording adequate opportunity to the petitioner to present his case.

Inasmuch as, after sending the letter dated 9.3.1981 the petitioner had submitted a classification list on 18.4.1981, wherein the petitioner's goods were classified as "cotton fabrics coated with artificial and other plastic materials manufactured out of duty paid base cotton fabrics, "and the said classification was approved by the 1st respondent on 30.4.1981, there is really no dispute whatsoever.

Virtually, it comes to the Department having accepted the classification list submitted by the 1st petitioner on 18.4.1981. It is rather intriguing what the matter to be resolved in the writ petition is.

In the above circumstances we dispose of the writ petition inacting the 1st respondent to dispose of the 1st petitioner's objections, if any, raised in his letter dated 9.3.1981 taking into account the classification list filed on 18.4.1981 refused to in paragraph 12 of the counter affidavit expeditiously as possible. In case the decision, of the 1st respondent goes against the petitioners. Needless to say that they may have to take recourse to the statutory remedies available to them if they need to do so. The writ petition is disposed of in the above terms. No costs.

4. The proceedings before us relating to the action of the authorities which followed this order of the Hon'ble High Court. In the meantime, the appellants were allowed the clearances in terms of the order of the Hon'ble High Court in the Miscellaneous Writ Petition referred to supra i.e. the appellants paid the duty under Tariff Heading 19(i) and executed a Bank Guarantee for the difference in duty payable under Tariff heading 19(iii) and 19(i). The dispute regarding classification subsisted till February end, 1996 when new Central Excise Tariff came into force. The issue, therefore, related to the differential duty payable during the period 1981 to 1986 during the period in which the interim order of the Hon'ble High Court held the ground. While the appellants were paying duty by securing the differential amount by execution of Bank Guarantee as above, the Departmental authorities with a view to augment their revenue figures, addressed the letters dated 23.12.85 (page-168 of the paper-book filed before us) for deposit of the

differential duty either provisionally or under protest or "on account" without prejudice to their legal claim pending before the Hon'ble High Court of Andhra Pradesh. The relevant para 2 of the letter of Shri M.V.S Prasad, Additional Collector of Central Excise, Hyderabad is reproduced below: 2. In view of the present situation existing in the country and keeping in view the overall national interest, I request you to kindly consider payment of the differential duty either provisionally or under protest or 'on account' without prejudice to your legal claim pending before the Honourable High Court of Andhra Pradesh till the court discloses off the writ petition filed by you.

This provisional/under protest payment will not amount to your accepting the department's contention and would be purely in the interest of the country.

This was followed by another letter by the Collector of Central Excise, Hyderabad, Shri R. Gopalanathan, by then as per this letter the amount secured by the Bank Guarantees has come to Rs. 7 Crores. The learned Collector in this regard has set out as under in his letter:-- In view of the present policy of the Govt. to collect all the amounts due, I request you to kindly pay the differential duty amounting to Rs. 3 crores provisionally without prejudice to your claim pending before the U.P. High Court. You may pay an amount of Rs. 2 crores before 31st August, 86 and another amount of Rs. 1 crore before 10th September, 1986. This provisional payment will not amount to your acceptance of the departmental contention and will be subject to the outcome of the writ petition pending in the A.P. High Court.

5. The appellants responded to this letter of the Collector and deposited some amount and in their letter dated 29th December, 1986 further to their discussions they had with the Collector on 26th December, 1986 and which fact is recorded in the letter of the Collector addressed again to them on 26th December, 1986 (page-166 of the paper book), both the learned Collector and the appellants have stated as under:-- So far you have paid Rs. 3 crores and the balance amount of Rs. 4 crores is payable by you. In view of the present policy of the Govt.

to collect all the amounts due request you to kindly pay the remaining amount of Rs. 4 crores provisionally without prejudice to your claim pending before the A.P. High Court. You may pay the sum of Rs. 4 crores in 3 instalments during January,

February and March '87. The 3rd instalment should however be paid before 10th March 1986. This provisional payment will not amount to your accepting the departmental contention and will be subject to the outcome of the writ petition pending in the A.P. High Court. Extract from the appellants letter dated 29.12.86: We would clearly like to bring to your notice in this letter the amounts already paid in the past and the amounts agreed to be paid hereunder are being paid under protest and without any prejudice to our contentions pending before the Court of law and the payments under in circumstances shall be construed as our having accepted the contentions of the Government of India in the dispute.

The amount which was paid by 20th January, 1987 by the appellant as above aggregated to 5.73 crores. The writ Petition came to be decided by the Hon'ble High Court on 18th March, 1987.

6. The Assistant Collector in pursuance to this direction of the Hon'ble High Court issued a letter dated 6.4.87 (page-159 of the paper book). The Assistant Collector by this letter gave his reasons as to why the goods would be classifiable under Tariff Heading 19(iii) and asked them to show cause and to put forth their case before he could issue an appealable order in regard to the classification. The appellants submitted their reply they joined the proceedings before the learned Assistant Collector. The Assistant Collector passed an order dated 4.5.87 after considering all the pleas of the appellants, confirming the classification of the goods as under the then Central Excise Tariff 19(iii) and confirmed the classification which was earlier approved under this heading vide his communication C. No.V/19/9/81 VC dated 30.4.81 and C. No. V/19/111/17/83 VC dated 25.5.83.

7. The appellants took-up the matter regarding the classification in appeal before the Collector of Central Excise (Appeals), Madras, the jurisdictional appellate authority. Subsequent to the passing of the order by the Assistant Collector on the classification issue, as a follow up action, a notice of demand was issued vide the communication by the Central Excise authorities C. No. V/59/17/ 2/87 VC2 dated 20.7.1987. Under this demand the amount payable by the appellants in terms of the classification of the goods under 19(iii) was indicated as Rs. 7,21,87,788.35/-

and amount already paid by them i.e. Rs. 5,73,91,500.00 were also indicated.

8. The appellants in the appeal earlier filed by them on 27.6.87 before the Collector (Appeals) raised the following additional grounds against this demand which was raised and the ground urged was that the demand was barred by limitation: 1. The notice of demand dated 20.7.87 has been issued without jurisdiction. Section 11A of the Act which alone is the provision under which the respondents can levy and recover the duty in the present case statutorily provides for issuance of a show cause notice prior to raising of demand. In the present case, no show cause notice has been issued instead a outright demand has been served. Hence, the notice of demand per se is illegal according to the decision of Supreme Court in .

2. That in any event, the demand raised in the present case is barred by limitation. In the present case, an interim stay order dated 3.4.81 of this Hon'ble High Court merely directed the respondents not to collect the Excise Duty. Hence, the stay was in relation to the collection of Excise Duty only. There was no stay or direction of the High Court in the matter of issuance of notice for the levy of Duty. The respondents were not at all precluded from issuance of notice for carrying out the levy, in terms of provisions contained.

9. The learned Collector (Appeals) decided the issue in the appeal on the classification issue in favour of the appellants. The learned Collector, however, in his order No. 205 & 206/87(H) dated 25.8.87 after deciding the classification issue has stated as under: In view of the above, it is not necessary to discuss the other points raised by the appellants such as non-issue of show cause notice before the demand is confirmed by the impugned order.

10. The Department filed an appeal before the CEGAT and also stay petition for staying the order portion of the order of the Collector (Appeals). This prayer for stay was not allowed vide order of the Tribunal S-35/88-D. Since the Department's prayer for stay was refused, the appellants addressed a letter to Collector of Central Excise, Hyderabad wherein they have referred to their earlier correspondence with the Collector and the Collector's letter dated 26.06.87 and also their letter dated 23.09.87 wherein they sought for the return of the amount of

Rs. 5,73,91,500/- which had been paid by them from time to time. The earlier correspondence which had been referred to by the appellants in their letter dated 25.06.1987 (page 125 of the paper book) and the letter of the Central Excise authorities dated 26.06.87.

In their letter the appellants have stated they should not be asked to pay the further sum of Rs. 1.45 Crores after they have effected the payment of Rs. 4,26,91,500.00 and the Assistant Collector had informed them that this amount of Rs. 1.45 Crores as under in the letter of 26.06.87: If you get a favourable order from the Collector (Appeals) then the amounts so far paid by you will be refunded to you if we don't get a stay order from the Tribunal against the order of the Collector (Appeals).

11. The then learned Collector of Central Excise, Hyderabad, Shri R.Gopalanathan with whom the appellants had made arrangements for payment of cash instead of furnishing of Bank Guarantee, addressed a letter dated 24.02.88 to the Assistant Collector with a copy to the appellants (page 104 of the paper book). In this letter the Collector has directed to the Assistant Collector as under: 2. The application for staying the repayment of refund has been dismissed by the Tribunal. Consequently you will have to effect the refund to M/s. Fenoplast on the basis of the order of the Collector of Central Excise (Appeals), Madras. The party met me today and requested that the money should be paid immediately as they have severe financial constraints. Please ensure that necessary verifications are undertaken expeditiously in this case and the refund cheque is issued to them by 31st March, 1988.

12. A show cause notice was issued thereafter by the Assistant Collector of the jurisdiction dated 29.03.88 under which it was stated that while the classification under Tariff item 19(iii) was held to be not correct by the learned Collector of Central Excise (Appeals), Madras and since the Collector has not decided on the alternate classification of the subject goods, it was indicated that the goods would merit classification under Tariff item 68 and the appellants were asked to show cause as to why the amount which was refundable could not be restricted to the amount after taking into consideration the duty payable under Tariff item 68. The

appellants represented against this to the Assistant Collector vide their letter dated 04.04.1988 (page 98 of the paper book). Vide letter dated 15.04.88 (page 95 of the paper book), the Assistant Collector informed the appellants that they are granted a provisional refund of Rs. 3 Crores and they were asked to furnish an undertaking as under: the amount now refunded will be paid to the department on demand in case the appeal filed before the CEGAT by the Department is finally decided by classifying the goods under T.I. 19 III.13. The appellant was further informed by the Assistant Collector vide his letter dated 07.06.88 about grant of the refund provisionally (page 94 of the paper book). The appellants finally got an amount of Rs. 3,77,535.96 i.e. Rs. 3 Crores under one letter of the Assistant Collector and the balance under the other letter of the Assistant Collector. The matter ultimately after the department's appeal was rejected by the Tribunal came to be finally settled by the judgment of the Hon'ble Supreme Court and the Hon'ble Supreme Court held the goods to be assessable under Tariff Heading 19 (iii). The authorities, therefore, after the judgment of the Hon'ble Supreme Court issued a notice to the appellants dated 16.11.94 from the file C. No. V/59/ 17/3/87-VC II, this notice has been designated as 'notice of demand'.

In his openings paras the learned Assistant Collector has stated that the Hon'ble Supreme Court has restored the Order-in-Original number C.No. V/59/17/3/87-VC II dated 04.05.87 and in the next para he has stated that the duty demand in the notice C. No. V/59/17/2/ 87- VC-II dated 20.07.87 issued by the Assistant Collector of Central Excise "has now become enforceable" and in para 3 of this communication the appellants were asked to pay the amount of duty which was to be paid by them in this notice is shown as Rs. 5,24,98,824.31. Taking into consideration the amount which had been already refunded to them, the balance of duty which was due to be paid by them shown is Rs. 1,47,98,288.35 and the amount refunded to them earlier as Rs. 3.77.00,535.96.

14. The appellants represented against this notice of demand and the appellants took various grounds pleaded that the demand was per se illegal and also that the same was time barred. Thereafter a communication was sent to them dated 29.11.94 by the Assistant Collector wherein it was stated that since they have not paid the amount in terms of the demand notice dated 16.11.94 and, therefore, he

had ordered the attachment of the excisable goods lying at their registered premises under I & II of the Central Excise & Salt Act, 1944. The appellants filed an appeal against this attachment order to the learned Collector (Appeals) and amongst other pleas urged the following: (i) The show cause notice issued in 1987, in pursuance of the Hon'ble High Court of A.P. 's ruling related only to classification and consequently an order passed on the show cause notice cannot traverse beyond the ambit of the show cause notice.

(ii) The order passed by the Asstt. Collector which was restored by the Supreme Court related to classification and did not relate to an assessment to duty. In fact, there is no quantification or determination of duty payable in that order.

(iii) A specific show cause notice should have been issued before an assessment or a demand is made.

(iv) The then Collector (A) also understood the order of the Asstt.

Collector as the one relating to classification of goods and not assessment.

(v) Between the date of the order of the Asstt. Collector in May 1987 and the order of the Supreme Court restoring the order, no steps had been taken by the Asstt. Collector towards making an assessment and a consequential demand.

(vi) Classification is only the first step in the process of determination of the duty. A demand is a final step. Since demand is made without first making an assessment order the same is not sustainable. The Supreme Court restored the order of the Asstt.

Collector determining the classification of the goods in question.

(vii) The impugned order dt. 29.11.94 was not proceeded by any show cause notice. The quantification of duty alleged to have not been paid is stated to be Rs. 5,24,98,824/-. The basis of this sum is not disclosed.

15. The learned Collector, however, held the demand as raised was in pursuance to the decision of the apex court and since the Assistant Collector's order were restored and which pertain to the classification of the goods under particular tariff

item, the duty was bound to be discharged by the appellants in terms of the classification decided.

He, therefore, dismissed the appeals of the appellants against the attachment order passed. In the meantime the appellants had also filed an appeal against the notice of demand dated 16.11.84 before the learned Collector (Appeals). This appeal filed was dismissed as the appellants did not comply with the directions of the learned Collector (Appeals) to predeposit the entire amount in terms of Section 35F of the Central Excise & Salt Act, 1944. This order of the learned Collector (Appeals) bears the Order-in-Appeal No. 253/95(H) dated 26.07.95. The appellants filed an appeal before the Tribunal against this order and the Tribunal fixed an amount for pre-deposit and remanded the matter for decision on the appeal. Consequent to the direction of the Tribunal, the learned Collector (Appeals) Dr. S.N.Busi passed the orders on the appeal filed by the appellants relating to the notice of demand by the communication of 16.11.94. He has held in this order that the appeal against the notice of demand dated 16.11.94 is not maintainable in law being not an order or a decision but merely an executive instructions to pay the arrears of revenue and he has observed as under in this context: While doing so, the Assistant Collector made a reference to the aforementioned judgment of the Hon'ble Supreme Court which revived the Order-in-Original dated 4.5.1987 read with the letter (Notice of Demand) dated 20.7.1987. When it cannot be considered as an "order" or a "decision", in my view, Fenoplast do not derive any statutory right to prefer an appeal against it under the provisions of Section 35 of the Central Excise and Salt Act, 1944.

In view of the foregoing discussions, it is crystal clear that the present appeal against the impugned letter (Notice of Demand) dated 16.11.1994 is not maintainable in law and, therefore, deserves to be rejected outright on this score alone.

The above Order-in-Appeal No. 388/96 was passed on 24.09.96. The appellants while they have filed an appeal against this order of the Collector (Appeals) have also filed an appeal against the order of the learned Collector Shri Moheb Ali who has upheld the order of attachment of the Assistant Collector vide his order No.

16. The learned Senior Advocate Shri Setelvad appearing for the appellants, narrated the above facts before us and these facts are not controverted by the Revenue. Arguing on the appeal, he has pleaded that the Hon'ble Supreme Court restored the Order-in-Original dated 04.05.87, this order of the Assistant Collector he pleaded was based on the classification issue. This order of the Assistant Collector he pleaded was followed by a notice of demand dated 20th July, 1987. He has pleaded that this notice of demand was issued requiring the appellants to pay an amount indicated thereunder without complying with the requirement of Section 11A which provides for the issue of a show cause notice and determination of the amount. The show cause notice, he pleaded is required to be issued within 6 months of the payment of duty and in the present case the same was not issued within the stipulated period of 6 months. He has pleaded, the appellants had approached the Hon'ble High Court of Madras in 1981 and the Hon'ble High Court of Madras by their interim order had restrained the Department for collection of the duty. He has pleaded that levy and collection under law are separate events and this position stands settled by the various judgments of the Hon'ble Supreme Court and High Courts and Tribunals.

He has pleaded that Section 3 of the Central excise Act states "there shall be levied and collected in such a manner as has been prescribed duties of excise of all excisable goods other than salt which are produced and manufactured in India and a duty on salt manufactured in.

or imported by land into, any part thereto". He pleaded that provision as existed at the relevant time clearly provided for the two events i.e. levy and collection of duty in the prescribed manner. He pleaded that the appellants made payments of over Rs. 5 Crores after the Hon'ble High Court passed the interim orders and these payments made were in the nature of deposit and not payment of duty. In this connection he referred us to . He referred us to the Head Notes A and B which read as under: Where the deposit is made in advance there is evidently an implied agreement that the amount would be refundable if not appropriated, and the depositor becomes a debtor for the purpose of the repayment of the money to the

person entitled to get back the deposit. Under the circumstances the deposit is liable to make the refund at the place where the depositor resides. AIR 1940 All 243. Disting. (S) AIR 1955 Madh-B 96. Rel. on.

Under the Indian Tariff Act read with the Land Customs Act and the Sea Customs Act an export duty becomes leviable when goods are exported and not on goods which are not exported or which could not be exported. If for the sake of convenience the Government has framed rules for deposit of duty in advance of the export, the appropriation of duty takes place only when there is an actual export. If no export is made, there is no appropriation of the duty which is deposited in advance. The amount of duty which has been deposited but not appropriated would evidently be repayable to the person who has deposited the money unless there is some provision of law which bars the recovery of this amount.

There is a clear distinction between amount appropriated towards duty and amount deposited for payment of export duty. In the former case duty which has actually been levied and paid evidently becomes the property of the Government and no person would be entitled to get it back unless there is a provision of law to enable that person to get the duty already appropriated, back from the State or the Government. In the latter case, however, when an amount has been deposited to be appropriated thereafter towards export duty which may fall due, there having been no appropriation the property in the money does not pass to the Government unless export takes place and the duty is levied.

He has pleaded the amount paid in terms of this judgment cannot be taken as duty as having been appropriated towards duty. He also referred us to the judgment of the Punjab & Haryana High Court filed at page 19 of the paper book in which case law has been cited wherein the Hon'ble High Court has held as under: Held, (i) that the advance tax collected from the petitioner had to be related to a final assessment order and since no final assessment order could be passed, the same having become barred by limitation, the collection of the advance tax itself became illegal and so also its retention.

In the same connection he referred us to the judgment of the Hon'ble Calcutta High Court in the case of Super Cassettes Industries Ltd., v. CC and When an amount equivalent to duty is deposited with proper officer for the purpose of preferring an appeal, such deposit cannot be treated as duty paid by the petitioner in pursuance to an assessment order. The amount deposited remained merely as deposit till the disposal of appeal by the Tribunal. Now the petitioner has succeeded in appeal. The petitioner is entitled to obtain refund of the amount deposited. Section 27 is not applicable in case of refund of amount deposited under Section 129E. It refers only to refund of duty paid in pursuance to assessment order. Therefore, provisions of Section 27 cannot stand in the way of refund of deposit made by petitioner for preferring an appeal to CEGAT. He also referred us to the Government of India revision petition reported in 1980 ELT 655 (G.O.I.) in respect of U.P. Gandhi Smarak Nidhi wherein it has been held as under: The petitioners have contended that Rule 11 of the Central Excise Rules, 1944, is applicable only to cases of refund of duties of charges which have been paid through inadvertence error of misconstruction. The petitioners further contend that this rule could not be applied to case of advance deposit as in the case under consideration. Government accepts the petitioners' contention viz.

that such cases of "Advance deposit" should be governed by the General Limitation Act and not by Rule 11 of the Central Excise Rules for purposes of limitation.

17. He has pleaded that the Order-in-Original which has been restored by the Hon'ble Supreme Court dealt with only the classification issue. He further pointed out that the Tribunal has also only ruled on the classification by majority that the goods would not be classifiable under Tariff Heading 19(iii) and the Member who gave a dissenting order Shri P.C. Jain also ruled only on classification under Tariff Heading 19(iii). He has pleaded that no demand of duty in terms of Section 11A had been raised at any time by issue of the show cause notice or otherwise. The only communication by which the demand was made was that on 20th July, 1987 i.e. the demand raised after the decision on classification came to be decided by the Hon'ble Supreme Court. He has pleaded the demand not having been raised within a period of 6 months from the payment of duty in respect of the fabrics

cleared, the same was barred by limitation. In this connection he referred us to the judgment of the Hon'ble Supreme Court in the case of Gokak Patel Volkart Ltd. v. CCE reported in AIR 1957 SC 1161 and drew our attention to paras 4, 5 & 6 of the judgment. Referring to the facts as set out in the judgment, he pleaded that in that case the appellants had filed a writ petition in the Hon'ble High Court of Karnataka and the Hon'ble High Court of Karnataka had passed an order dated 04.06.76 in Writ Petition No. 2632/76 wherein the following direction was issued: Pending disposal of the aforesaid Writ Petition, it is ordered by this Court that collection of excise duty as a fabric be and the same is hereby stayed. It is further ordered that the petitioner shall however continue to pay excise duty as yarn and shall further maintain an account in square metres for future clearance.

The rule was ultimately discharged and the Court chose not to interfere in the matter. In the demand for the period prior to 20th February, 1981 was sought to be made by notice issued on 20th May, 1982. Paras 4, 5 & 6 of the judgment are reproduced below for convenience of reference: 4. It is not disputed by the Revenue that the appropriate period of limitation to apply to the facts of the case is six months as provided in Section 11A of the Act and that the Notice issued on 20th of May, 1982 was beyond that period. Reliance was placed on the Explanation for obtaining extension of that period. The Explanation reads thus: 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.

The provision in the Explanation incorporates a well known principle of law. Section 15, Limitation Act, 1908 (also of Section 15, Limitation Act, 1963) incorporates the same principle. This Court in Sirajul Haq Khan v. Sunni Central Board of Waqf, U.P. , dealt with the effect of an order of injunction in the matter of computation of limitation. At page 1302 (of SCR) : (at p. 205 of AIR) of the Reports, Gajendragadkar, J. as he then was, spoke for the Court thus: It is plain that, for excluding the time under this section, it must be shown that the institution of the suit in question had been stayed by an injunction or order; in other words, the section requires an order of an injunction which stays the institution of the suit. And so in cases falling under Section 15, the party instituting the suit would by

such institution be in contempt of Court.

But, in our opinion, there would be no justification for extending the application of Section 15 on the ground that the institution of the subsequent suit would be inconsistent with the spirit or substance of the order passed in the previous litigation.

In the instant case, the order of stay passed by the Karnataka High Court had only stayed the collection of the excise duty, which is a stage following levy under the scheme of the Act. Obviously there was no interim direction of the High Court in the matter of issue of notice for the purpose of levy of duty. The relevant portion of Section 11A provided: (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice; * * * * * (2) The Assistant Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served under Sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

Reference to Section 3 of the Act which contains the charging provision clearly shows that levy and collection are two distinct and separate steps. This Court in N.B. Sanjana v. Elphinstone Spinning & Weaving Mills Co. Ltd. ...The charging provision Section 3(i) specifically says "there shall be levied and collected in such a manner as may be prescribed the duty of excise." It is to be noted that Sub-section (i) uses both the expressions "levied and collected" and that clearly shows that the expression "levied and collected" and that clearly shows that the expression "levy" has not been used in the Act or the Rules as meaning actual collection.' 5. The High Court having directed stay of collection had, therefore, not given any interim direction in the matter of issue of notice or levy of the duty. The Explanation in clear terms refers to stay of service of notice. The order of the High

Court did not at all refer to service of notice. Therefore, there is force in the submission of the appellant that the benefit of the Explanation is not available in the facts of the case.

6. No notice seems to have been issued in this case in regard to the period in question. Instead thereof an outright demand had been served. The provisions of Section 11A(1) and (2) make it clear that the statutory scheme is that in the situations covered by Sub-section (1) a notice of show cause has to be issued and Sub-section (2) requires that the cause shown by way of representation has to be considered by the prescribed authority and then only the amount has to be determined. The scheme is in consonance with the rules of natural justice. An opportunity to be heard is intended to be afforded to the person who is likely to be prejudiced when the order is made before making the order thereof.

Notice is thus a condition precedent to a demand under Sub-section (2). In the instant case, compliance with this statutory requirement has not been made and, therefore, the demand is in contravention of the statutory provision. Certain other authorities have been cited at the hearing by counsel for both sides. Reference to them, we consider, is not necessary.

18. He pleaded in the judgment cited supra, the Hon'ble Supreme Court has relied upon their earlier judgment in the case of Sirqjul Haq Khan and referred us to para 19 of that judgment which is reproduced below for convenience of reference: (19) The next question which calls for our decision is whether the appellants' suit is saved by virtue of the provisions of Section 15 of the Limitation Act. That is the only provision on which reliance was placed before us by Mr. Dar on behalf of the appellants. Section 15 provides for "the exclusion of time during which proceedings are suspended" and it lays down that "in computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn, shall be excluded". It is plain that, for excluding the time under this section, it must be shown that the institution of the suit in question had been stayed by an injunction or order; in other words, the

section requires an order or an injunction which stays the institution of the suit. And so in cases falling under Section 15, the party instituting the suit would by such institution be in contempt of court. If an express order or injunction is produced by a party that clearly meets the requirements of Section 15. Whether the requirements of Section 15 would be satisfied by the production of an order or injunction which by necessary implication stays the institution of the suit is open to argument. We are, however, prepared to assume in the present case that Section 15 would apply even to cases where the institution of a suit is stayed by necessary implication of the order passed or injunction issued in the previous litigation. But, in our opinion, there would be no justification for extending the application of Section 15 on the ground that the institution of the subsequent suit would be inconsistent with the spirit or substance of the order passed in the previous litigation. It is true that rules of limitation are to some extent arbitrary and may frequently lead to hardship; but there can be no doubt that, in construing provisions of limitation, equitable considerations are immaterial and irrelevant, and in applying them effect must be given to the strict grammatical meaning of the words used by them: *Nagendra Nath Dely v. Suresh Chandra Dey* 34 Bom LR 1065 : AIR 1932 PC 165.

In the same context he referred us to the judgment of the Hon'ble Supreme Court in the case of *Union of India and Ors. v. Madhumilan Syntex Pvt. Ltd.* and attention to the observations of the Hon'ble Supreme Court at page 352 of this judgment as under: A perusal of the aforesaid provisions shows that before any demand is made on any person chargeable in respect of non-levy or short-levy or under payment of duty, a notice requiring him to show cause why he should not pay the amounts specified in the notice must be served on him. It is the admitted position in the present case that no such notice was served. It would thus appear that the aforesaid demand notice dated 7th February, 1984 was in violation of the provisions of Section 11A and is bad in law. Mr. Govind Das, learned Counsel for the appellant, however, contended that although the aforesaid section provided that no demand could be made against a person thereunder without affording that person an adequate opportunity to show cause against the same, in the present case, though no prior show cause notice was given and the petitioners were not given an opportunity to be heard before the notice of demand was issued, such a notice was issued and an opportunity to show cause was given after the demand

was made and the demand confirmed after hearing and hence it must be regarded as valid. It was submitted by him that post facto show cause notice should be regarded as adequate in law. In support of this contention Mr. Govind Das lead to place reliance on certain decisions where a view has been taken that in cases where urgent and emergent action is required, an opportunity to be heard can be given after the order affecting a person adversely is passed and that where a particular Act does not provide for any such opportunity to be heard being given before an adverse order is passed a post facto opportunity to be heard might, in certain cases, be regarded as adequate compliance with principles of natural justice. We are of the view these cases have no relevance in considering the questions before us because it is quite apparent that in the present case no urgent or emergent action was required and Section 11A of the Central Excise Act clearly provides that prior show cause notice must be issued to the person against whom any demand on ground of short-levy or non-levy of payment of excise duty is proposed to be made. In *Gokak Patel Vokkart Ltd. v. Collector of Central Excise, Belgaum* has held that the provisions of Section 11A(1) and (2) of Central Excises and Salt Act Act. 1944 make it clear that the statutory scheme is that in the situations covered by Sub-section (1), a notice of show cause has to be issued and Sub-section (2) requires that the cause shown by way of representation has to be considered by the prescribed authority and then only the amount has to be determined. The scheme is in consonance with the rules of natural justice. An opportunity to be heard is intended to be afforded to the person who is likely to be prejudiced when the order is made before making the order. Notice is thus a condition precedent to a demand under Sub-section (2).

He also referred us to the judgment of the Hon'ble Supreme Court in the case of *CCE, Baroda v. Kosan Metal Products Ltd.* wherein the Hon'ble Supreme Court has clearly stated that when a demand is made under the Act for recovery then such demand must be under Section 11A of the Act. He pleaded that on amendment of Rule 9 and 49 which provided for specifically levy of duty in respect of captive consumption, the Hon'ble Supreme Court in the case of *JK Cotton Spinning Mills* clearly held in para 31 and 32 that inspite of this provision the demand could be only in terms of Section 11A of the Central Excise Act, 1944 and despite the amendment of Rule 9 and 49, the provisions of Section 11A will hold

the sway. The above para 31 & 32 are reproduced below for convenience of reference: 31. The apprehension of the appellants is that the amendments to Rules 9 and 49 having been made retrospective from the date the Rules were framed, that is, from Feb. 28, 1944, the appellants and others similarly situated may be called upon to pay enormous amounts of duty in respect of intermediate goods which have come into existence and again consumed in the integrated process of manufacture of another commodity. There can be no doubt that if one has to pay duty with retrospective effect from 1944, it would really cause great hardship but, in our opinion, in view of Section 11A of the Act, there is no cause for such apprehension. Section 11A(1) of the Act provides as follows:-- Section 11 A.--(1) When any duty on excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice: Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement 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.

32. Under Section 11A(1) the excise authorities cannot recover duties not levied or not paid or short-levied or short-paid or erroneously refunded beyond the period of six months, the proviso to Section 11A not being applicable in the present case. Thus although Section 51, Finance Act, 1982 has given retrospective effect to the amendments of Rules 9 and 49, yet it must be subject to the provision of Section 11A of the Act. We are unable to accept the contention of the learned Attorney General that as Section 51 has made the amendments retrospective in operation

since Feb. 28, 1944, it should be held that it overrides the provision of Section 11A. If the intention of the Legislature was to nullify the effect of Section 11A, in that case, the Legislature would have specifically provided for the same. Section 51 does not contain any non obstante clause, nor does it refer to the provision of Section 11A. In the circumstances, it is difficult to hold that Section 51 overrides the provision of Section 11A. In para 34 also the Hon'ble Supreme Court has taken the same view which is also reproduced below for convenience of reference: 34. There is no provision in the Act or in the Rules enabling the excise authorities to make any demand beyond the periods mentioned in Section 11A of the Act on the ground of the accrual of cause of action. The question that is really involved is whether in view of Section 51, Finance Act. 1982, Section 11A should be ignored or not.

In our view Section 51 does not, in any manner, affect the provision of Section 11A of the Act. In the absence of any specific provision overriding Section 11A, it will be consistent with rules of harmonious construction to hold that Section 51, Finance Act, 1982 in so far as it gives retrospective effect to the amendments made to Rules 9 and 49 of the rules is subject to the provision of Section 11A. He has pleaded, the learned Assistant Collector had no power to demand duty without issue of show cause notice and the demand, therefore, was not sustainable in law if the notice of demand was issued beyond the period of 6 months in violation of the stipulation under Section 11A of the Central Excise Act.

19. Adverting to the ad hoc payments made by them between 1986 and 1987, he has pleaded the amounts were paid only as deposits and these could not be taken as payments towards duty. These payments are made without prejudice to the appellants' rights pending the decision in the writ petition. Part of these amounts were returned and these returned amounts could not be taken to be refunds. In this connection he referred us to the judgment of the Tribunal in the case of CCE, Chandigarh v. Doaba Cooperative Sugar Mills, Nawanshahar and referred us to para 3 of the judgment, His plea is that the Tribunal has held that if any extra legal arrangement was adopted by the Department, that would not come in anyway override the provisions of Section 11A. Para 3 of this judgment for convenience of reference is reproduced below: 3. The other plea of the department is that since it

had been following an extra-legal procedure, by giving the rebate in advance of actual clearances of the excess sugar, the payment should be deemed to be a provisional one and the time limit of Section 11A should not apply to its recovery. We find no merit in this plea.

There is no provision in the central excise law for any provisional refund. Secondly, in the present case at least the rebate paid towards the quantity exported cannot be treated as provisional because full facts of the export were known to the department when it determined and paid the said rebate. Thirdly, when the department comes to us with a statutory appeal, the Tribunal has to decide it in accordance with the provisions of the statute only. If either party wishes to have relief on the ground that something extra-legal had been done, the remedy, if any, should have to be sought elsewhere.

He pleaded that there was no provision in law to give provisional refund as described by the Assistant Collector when he returned the amounts to the appellants after the stay against the order of the Collector (Appeals) was refused by the Tribunal. He has pleaded that the payment only as that of the amount deposited by them.

20. He has pleaded the demands were raised only by the letters of the Assistant Collector dated 20.7.87 & 16.11.94 which were the only legal order for the purpose of demanding the duty which had not been paid by the appellants for reason of payment of duty under Tariff Heading 19(i) as against 19(iii). The other legal order he has pleaded was dated 29.11.84 of the Assistant Collector under which he ordered for the attachment of the appellant's properties under Section 11 of the Central Excise Act. He has pleaded, these legal orders are appealable. He has pleaded the learned appellate authority, i.e. the Collector (Appeals), Dr. Busi has wrongly held that the demand notice of 16.11.94 was not an appealable order. He referred us in this connection to Section 35 and 35B of the Central Excise & Salt Act, 1944. He pointed out that under Section 35 for appeal to the Collector (Appeals) (now Commissioner (Appeals)), there is no restraint as to the scope of the appeal. He has pleaded in para 11 in the impugned order the learned Collector has taken note of the submissions as were made before him both on law and on

facts including the pleas that the demand was not sustainable in law being barred by limitation under Section 11A of the Central Excise & Salt Act, 1944. The learned lower authority, however, without advertent to the pleas as were made under para 11, proceeded to first enter the findings as to whether the appellants could legally file an appeal under the provisions of Section 35(0 of the Central Excise & Salt Act. He has pleaded after referring to Section 35, he referred to various authorities to hold that the letter of demand dated 16.11.94 could not be taken to be a decision for that he referred to para 18 of the learned lower authorities order which is reproduced below: 18. As far as the expression "decision" is concerned, it has a very broad and wide connotation. In Venkataramaiy's Law Lexicon term the following meaning is assignee to the said expression: Whenever a question is determined or a definite opinion is formed or a judgment is rendered, or a conclusion is arrived at, after weighing the reasons for and against the proposition, it is a decision in 26 CJS 41, there is the following statement: A popular and not a technical or legal word and a comprehensive term, having no fixed legal meaning. It has been said that a decision necessarily involves a dispute, actual or potential, and the reaching of conclusion and it implies the power to say 'yes' or 'No'. In the civil law generally it means determination of a question, the final order which disposes of a unit or a statute which orders or directs the performance of a duty. Under some circumstances 'decision' has been held equivalent to, or synonymous with 'ascertainment', 'award' and 'order'.

The expression 'to decide' means "settle (question, issue, dispute) by giving victory to one side; give judgment (between, for in favour of, against): bring, come to a resolution".

21. He also pointed out to the scope of the term order as held by the learned lower appellate authority in para 19 and 20 of his order. These paras are also reproduced below for convenience of reference: 19. Coming to the expression "order", Blacks Law Dictionary defines it as "A mandate, precept, a command or direction authoritatively given." In Section 2 of the Civil Procedure Code, the word "order" has been defined as "the formal expression of any decision of a civil court which is not a decree". In Jowitt's Dictionary of English Law (Vol.2) at page 1290

the word "order" has also been assigned the meaning as "Mandate, Precept, command; also a class or rank".

In *Dodla Mallaiah v. State of Andhra Pradesh* : the expression "order" has been understood to mean in the same way as defined in Section 2 of the Civil Procedure Code. It was amplified that the word "judgment" may relate both to a decree as well as an order.

20. As evident from the various meanings assigned to the expressions "decision" and "order", the letter (Notice of Demand) dated 16.11.1994 cannot fall within their ambit for the simple reason that there were proceedings pending before the Assistant Collector to give his decision or pass any order. In the absence of any such proceedings, no decision or order can emanate. A close perusal of the historical background of the case, as narrated in the preceding paragraphs, would make it amply clear that matter reached finality with the judgment dated 27.6.1994 of the Hon'ble Supreme Court which revived the Order-in-Original dated 4.5.1987 read with the letter (Notice of Demand) dated 20.5.1987 of the Assistant Collector. The impugned letter (Notice of Demand) dated 16.11.1994 merely seeks to enforce the demand of duty quantified by the Assistant Collector.

Division I. vide his letter (Notice of Demand) dated 20.7.1987 issued pursuant to his own Order-in-Original dated 4.5.1987 which was set aside by Collector (Appeals) and Hon'ble CEGAT but was revived by the judgment dated 27.6.1994 of the Hon'ble Supreme Court of India. The said letter (Notice of Demand) dated 16.11.1994 is not the result of any proceedings pending before him wherein the Assistant Collector was to give a decision or pass an order. Since no proceedings, either judicial or quasi-judicial, were pending before that authority, it is absurd to imagine that he could have issued an order or given his decision. For this reason, I have no hesitation in coming to the conclusion that the impugned letter (Notice of Demand) dated 16.11.1994 cannot be considered to have communicated any decision or order of the Assistant Collector. The impugned letter (Notice of Demand) can be construed as an instruction to Fenoplast to comply with the judgment dated 27.6.1994 of the Hon'ble Supreme Court. This is quite evident from the tenor and tone of the letter dated 16.11.1994. It is unfortunate that the

said letter was styled as Notice of Demand. To call it a Notice of Demand, to say the least, is a misnomer. A rose is a rose by whatever name it is called. Simply because a "letter" is styled as "Notice of Demand" it does not automatically convert itself to be so. The contents reveal its real character and not its title which, at times, may be a misleading one.

22. He has pleaded that the learned lower authority has held that the communication of 16.11.94 could not be considered as an order and that it only can be considered as an executive instruction. The learned lower authority, he has pleaded was in error in holding that the issue had acquired finality by the order of the Supreme Court which was only on the question of classification. The learned lower authority's findings in this regard is reproduced below: While doing so, the Assistant Collector made a reference to the aforementioned judgment of the Hon'ble Supreme Court which revived the Order-in-Original dated 4.5.1987 read with the letter (Notice of Demand) dated 20.7.1987. When it cannot be considered as an "order" or a "decision", in my view, Fenoplast do not derive any statutory right to prefer an appeal against it under the provisions of Section 35 of the Central Excises and Salt Act, 1944.

In view of the foregoing discussions, it is crystal clear that the present appeal against the impugned letter (Notice of Demand) dated 16.11.1994 is not maintainable in law and, therefore, deserves to be rejected outright on this score alone.

23. He has pleaded that the notice of demand dated 16.11.94 which was impugned before the learned lower authority was in the nature of a peremptory demand and in this connection he has referred us to the judgment of the Hon'ble Calcutta High Court in the case of Kantilal Somehand Shah and Anr. v. CCE, West Bengal and Anr. reported in 1982 ELT 902 (Cal) and referred to the Head Notes which reads as under: Words and Phrases--'any decision or order'--Section 128 of Customs Act, 1962-Scope--The expression 'any decision or order in Section 128 of the Customs Act, 1962 are of wide amplitude and include all orders or decisions passed under the said Act.

The relevant para 30 is reproduced below for convenience of reference: 30. The expression "any decision or order" as in Section 128 of the said Act, are of wide amplitude and include all orders or decisions passed under the said Act. The authorities, deciding the Appeal, as indicated hereinbefore, function as quasi-judicial authorities in the matter of disposing the Appeals. It is also true that Sections 128, 130 and 137 form a complete machinery for obtaining appropriate and necessary reliefs. The availability of appropriate remedy, as indicated hereinbefore, under Article 226 of the Constitution of India, would be available in appropriate cases and under special circumstances.

His plea is that this so called communication of 16.11.94 is appealable and requires the appellant to pay a certain sum which according to them was not payable. He has pleaded, as it is the other Collector (Appeals) Shri Moheb Ali, before whom the order regarding attachment of property was urged has gone into this aspect. He has, therefore, pleaded that the appellants were not liable to pay any amount as the demand was hit by limitation and the order of the lower authority upholding the demand by holding the communication of 16.11.94 as not appealable was not sustained in law.

24. On behalf of the Department the Senior Central Government Standing Counsel, Shri V.T. Gopalan has pleaded that he will be urging the pleas on the following points: (ii) Even arguing that Section 11A applies, it had been substantially complied with.

(iii) Question of liability arising out of the final order of the Hon'ble Supreme Court cannot be challenged on the principles of constructive res judicata.

25. Adverting to the last point first, he referred to the judgment of the Hon'ble Supreme Court under which the issue was finally settled regarding classification under Tariff Heading 19(iii), this judgment copy is filed at page 17 in the paper book filed by the appellant. He has pleaded that the assessee did not make a defence before the Hon'ble Supreme Court as the demand could not be raised under Section 11A. He pleaded that since the matter was before the Hon'ble Supreme Court, the consequence of the decisions should have been perceived by the assessee and they should have suo motto put forth the defence regarding the

bar of limitation and the demand being not sustainable under Section 11A. He has pleaded that the court's order could not be a futile exercise. His plea is, this point of demand being barred by limitation not having been raised in terms of Section 11A, could not be, therefore, raised at this stage and the point not having been taken before the Hon'ble Supreme Court acts as res judicata. He has pleaded that the principles of constructive res judicata would apply. In this connection he referred to the judgment of the Hon'ble Supreme Court in the case of M/s. Sathyadhyan Ghosal and Ors. . He referred us to para 7 at page 943 of this judgment. This para 7 is reproduced below for convenience of reference: (7) The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter--whether on a question of fact or a question of law--has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

26. He has adverted to the order of the Assistant Collector dated 4.5.87 under which the learned Assistant Collector held the goods to be classifiable under Tariff Heading 19(iii) and thereafter the demand notice issued by the Assistant Collector on 20.7.87. The assessee, he pleaded filed an appeal before the Collector against the order of classification and consequent on the demand being raised as follow-up of that order of 20.7.87 they filed additional grounds in appeal before the Collector. He pointed that the demand was the issue before the Collector (Appeals). After the decision of the Collector on the classification issue, the learned Collector did not choose to deal with the issue of the demand being barred by limitation. This order of the Collector (Appeals), he pointed out was taken up in appeal before the Tribunal who by a majority decision in the order reported in 1989

ELT 659 upheld the classification under 19(iii). He has pleaded that one of the Members who was in minority took note of the plea of limitation and in this connection he referred us to para 17 of this order which is reproduced below: Next question raised by the respondent company regarding the demand being hit by limitation inasmuch as no show cause notice of demand has been issued by the department. We are unable to deal with this point because we find that the question of demand did not arise in the Order-in-Original. It was merely a question on classification of product whether it falls under T.I. 19-III. Therefore, this is a question which is required to be taken up separately by the respondent company and get a speaking order from the lower authority before the matter can be dealt with at our level.

He pointed out that since one Member has dealt with this point and no findings had been entered in this regard, he pointed out that since this point had not been decided, the appellants could have taken up this at the time of appeal before the, Hon'ble Supreme Court. He pleaded that since this point was not pressed before the Hon'ble Supreme Court, it cannot be raised in the future litigation in view of the judgment cited by him. He pleaded that once the issue has been decided between the two parties, principles of res judicata would apply. In this connection he also referred us to the judgment of the Hon'ble Supreme Court wherein at para 20 the Hon'ble Supreme Court has held that a ground which should be taken should have been taken before the Hon'ble Supreme Court, He, therefore, pleaded that the limitation issue should be taken to have been decided by the judgment of the Hon'ble Supreme Court for the reason that this ground not having been taken could not be raised now. The above decision of the Supreme Court he pleaded was followed in another decision by an apex court in the case .

27. In regard to the applicability of Section 11A he pleaded that the Hon'ble High Court of Andhra Pradesh by their interim order had prevented the Department from taking any action under Section 11A for recovery of the differential duty. He has pleaded that the starting point for raising the demand would be 4.5.87 when the Assistant Collector decided the matter in terms of the order of the Hon'ble High Court of Andhra Pradesh Pradesh finally disposed of the writ petition with the direction for re-consideration of the classification after taking into consideration the

representation made by the appellants vide their letter dated 9.3.81 and before that the interim order of the Hon'ble High Court dated 3.4.81 for holding the ground.

28. He has pleaded that the appellants effected the clearances by paying duty as applicable to Tariff Item 19(i) and were furnishing the Bank Guarantee for the differential amount taking into consideration the amount payable in case the duty was charged under Tariff Item 19(iii).

29. He has stated that this order of classification of the Assistant Collector dated 4.5.87 was set aside by the order of the Collector (Appeals) dated 25.8.87 and which order of the Assistant Collector was ultimately after decision of the Tribunal confirming the Collector's order was restored by the Hon'ble Supreme Court. He has pleaded in this background question of issue of show cause notice did not arise under Section 11A. He has pleaded, once the question of classification came to be settled, the duty demand had to be based on that order of classification. The classification issue was settled, he has pleaded subsequently the Assistant Collector after deciding the issue on 4.5.87 had in fact issued the demand on 27.5.87.

30. At this stage the learned advocate for the appellants Shri Setelvad interjected and pointed that the question of classification was already decided in 1981 & 1983 as is seen from the order of the Assistant Collector referred to by the learned Advocate for the respondent, as is evident from the last para of the order of the Assistant Collector. The said para referred in the order dated 4.5.87 is reproduced below for convenience of reference: In view of the foregoing I confirm that the subject goods fall under tariff item No. 19 III and approval of the classification lists accorded in this office files: to the two units of the company situated at Patanchoru and Nandigaon, Modak respectively is in order and do not warrant any revision. The company shall pay the relevant duty on the goods manufactured by them accordingly and question of granting refund of the duty to the company does not arise.

The learned Advocate for the respondents, however, continuing with the arguments pointed out that the final order of classification came to be passed only

on 4.5.87 and the subsequent demand raised on 27.5.87 only referred to this order and by this communication of 27.5.87 the Assistant Collector called upon the appellants to pay the balance amount remaining due. He has pleaded that the order of classification was set aside, therefore, the notice of demand could not have had independent existence in the facts of this case. The Department could not have proceeded further in the matter of recovery and any other step would have been violative of the order of the Collector. He, in this connection referred us to the order of the Division Bench of the Madras High Court in the case of HN Marian and Others wherein the Hon'ble Court 2. The appellants are manufacturers of safety matches. On 4.6.1979, a Notification No. 201/79-CE was issued, which was later on amended by Notification No. 264/79/CE, dt. 29th September, 1979. These notifications provided for a set-off duty on all excisable goods to the extent the duty paid goods falling under item 68 had been used as an input. In proviso 3 of the said notification it was provided that the notification will not apply to the goods on which excise duty had been paid through bande rolls. The appellants challenged the validity of the proviso 3 by preferring writ petitions contending that the notification allowed set-off of excise duty on inputs like Potassium chlorate, glue and phosphorus etc., all of which go into the manufacture of safety matches, while the proviso however had denied the benefit of the notification to the manufacturer of safety matches only on the ground that they pay excise duty on matches through band rolls. On this basis it was urged that there was a clear discrimination. W. P 1554 of 1981 batch were admitted and an interim injunction was granted on 24.3.1981. As a result of the interim injunction the respondent--(Superintendent of Central Excise, Sankarankoil) was restrained from collecting excise duty referable to the value of the imports. It may be stated at this stage that the Central Excise department did not accept the claim of the appellants. It was urged on its behalf that there was no discrimination whatever especially in a matter granting benefit or exemption. It was further urged that the writ petitioners cannot claim exemption as of right. Those writ petitions were ultimately dismissed on 16.11.1981 by a Division Bench of this Court holding that proviso 3 to the Notification No. 201 of 1979-CE, dated 4.6.1979 as amended, was valid. After the disposal of these writ petitions the Superintendent of Central Excise, issued similar notices to the appellants in the following terms: Sub: Central Excise--Matches--Realisation of differential duty

involved consequent to dismissal of W. P. No. On your filing the aforesaid writ petition the High Court at Madras granted interim injunction restraining the department from collecting the duty on matches manufactured and cleared from your factory at a rate in excess of Rs. 4.40 while the rate of duty applicable in respect of such matches in accordance with notification No. 48/81, dated 1.8.81 as amended by Notification No. 88/ 81, dated 31.3.1981, is Rs. 4.60.

2. Now that the writ petition is dismissed by the High Court at Madras, in their order dated 16.11.1981, the differential duty that was payable by you but not realised from you in obedience to the said High Court's order, is liable to be paid by you.

3. You are, therefore, directed to pay the differential duty as per details in the worksheet furnished over-leaf within 10 days of the receipt of this order, failing which action will be taken to recover the said amount in accordance with the law.

31. He further pleaded there could no dichotomy regarding the collection of duty and levy in view of the interdiction by the Hon'ble High Court. In this connection he referred us to the decision reported in 1990 47 ELT 231, to para 5. He also referred us to the judgment of the Hon'ble Supreme Court . The above para 5 is reproduced below for convenience of reference: 5. On remand another Assistant Collector one P.R. Joshi has passed the order on 12th May, 1989. Apart from the curious and clumsy language of this order, the order remand does not even satisfy the basic requirement which the Appellate Collector enjoined, viz. to explain why the decision the the Borivli case was not to be applied.

The assessee had before him, at the time of the second remand, also relied upon a decision of the Tribunal (CEGAT). The reply of the department was that since they had referred an appeal to the Supreme Court from that decision the said decision should be followed. That fallacious reasoning has appealed to the Assistant Collector. This is totally unacceptable and amounts to indiscipline of the worst sort. This indicates how quasi-judicial powers are being misused by people who are not qualified to exercise the same. Their only purpose seems to be to collect as much money as possible or to harass the assessees to the maximum extent possible. The difficulty is what is to happen in future, because we are quite

sure that if we pass an order of remand such incompetent and indisciplined officers will go on passing orders in this unsatisfactory manner. There seems to be no control of the department over such officers.

32. His plea is that once the levy was set aside, the collection of the same could not be done as collection follows levy. He pleaded that entire amount was at large for reason of the appeal to the Hon'ble Supreme Court and no doubt valid for the same for the judgment of the Division Bench of the Madras High Court referred to the last four lines at page-223 which is reproduced below: However, on the injunction being dissolved on 19.11.81, consequent to the dismissal of W.P. 1554 of 1981, batch, we see no obstruction in the way of the department recovering the full excise duty. To put the matter simply:-- The charge was already there and got attached to the goods on removal. Only the right of recovery by enforcement of the charge got postponed by reason of the order of the court.

33. He has pleaded that although the Assistant Collector has called his letter dated 16.11.94 as a notice of demand, in fact that need not be considered as a notice of demand but communication as to the amount which was required to be paid by the appellants. His plea is that after the judgment of the Hon'ble Supreme Court, the assessee was required to pay the amount on his own. He in this connection referred us to para 16 and 19 of the judgment cited supra which are reproduced below for convenience of reference: 16. The decision rendered in W.P. 4145 of 1967 of this Court equally has no application because in that case the matter was not kept alive by making the demand. After the judgment of this Court in W.P. 3838 of 1968, which struck down the notification, the Central Excise department did not pursue the demand and allowed the matter to become final. Therefore, it was held that in spite of favourable decision by the Supreme Court reversing the above view of the High Court, resort for recovery of escaped levy could not be had excepting under Rule 10. Certainly this is not the position here. In W.P. 1554 of 1981, the department took a definite stand that proviso 3 was valid. But for the injunction the department would not have allowed the removal of safety matches by the appellants without payment of proper and full excise duty.

19. To our mind the present case is governed by the ratio of the ruling in W.P. 11318 of 1981 of this Court. There, the learned Judge has held under identical facts, as follows:-- The liability to pay duty having been already established by the disposal of the writ petition, the authorities are well within their jurisdiction to recover the amount straightaway from the petitioners in each writ petition and there is nothing left for them to decide where duty is payable or not. The present attempt made, if entertained, would only result in not only deliberate avoidance to pay duty, but would also amount to abuse of process of court, which cannot be encouraged.

34. He has pleaded after the appellants had been restrained by the Hon'ble High Court, it would have been incongruous if the demand had been raised for the differential duty. The matter, he pleaded was pending before the Hon'ble High Court and after the writ petition was finally disposed of, the classification issue came to be decided finally on 4.5.87 in terms of the directions of the Hon'ble High Court in their final order. He has pleaded that the provisions of Section 11A will not apply from back date as the matter was subjudiced till then. The limitation, therefore, would not come into play. In support of the above plea, he cited the judgment of the Tribunal .

35. As to the amount which was refunded to the appellants, he pleaded that this was with respect to the return of the amount consequent on the order of the Collector (Appeals) holding that the goods could not be classified under Tariff Item 19(iii). He has pleaded that this amount which was refunded had to be returned by the appellants as the fact of the refund goes with the fact of the order. He has pleaded that under the law, Assistant Collector had the delegated power to make the refund after the same became clue.

36. The learned Senior Advocate Shri Setelvad in reply pleaded that what has to be taken note of is that the clasification issue had been decided by the approval of the classification list in 1981 & 1983 brought out in the order of the Assistant Collector dated 4.5.87. He pleaded that the ratio of the decision will not be applicable to the facts of this case.

He has pleaded that the order of the Hon'ble Court dated 3.4.81 did not place any restraint on the Department for issue of a show cause notice. In the order that came to be passed in terms of the Hon'ble Court was 4.5.87. In the respect of the demand, therefore, made on 20.7.87 after the order of classification of 4.5.87, appellants have grievances three fold in that regarding: He has pleaded that the respondents reliance in Madras High Court's judgment could not be placed as that judgment was rendered before the judgment of the Hon'ble Supreme Court in the case of Gokak Patal AIR 87 SC 1161. He has pleaded that the decisions of the Hon'ble Madras High Court was rendered in the context of Rule 10. In the present case the answer has to be found in the context of Section 11A. He has pleaded that Section 11A takes note of the contingency of interdiction by Hon'ble High Court and referred to the explanation under this section for exclusion of the period of the stay if there was a restraint for the service of the notice. In this connection he referred us to the judgment of the Tribunal wherein taking note of the We have carefully considered the submissions made by both the sides.

In the instant case, DD 2 form issued after passing the order by the Tribunal cannot be treated as show cause notice. In view of the judicial pronouncements. It is clear these demands were in contravention of the statutory requirements. In the absence of the show cause notice issued by the department after passing the order by the Tribunal, demand raised based on DD 2 form cannot be justified and, as such order in raising demand is not sustainable in our view. In the view, we have taken, we accept the plea of the appellants that demand is clearly barred by time in this case. With this view, we set aside the impugned order and accordingly the appeal is allowed with consequential relief.

37. He has also referred to the judgment of the Hon'ble Karnataka High Court in the case of Durga Works v. Assistant Collector of Central Excise held following the judgment of the Hon'ble Supreme Court in the case of Gokak Patel, after taking note of the scope of Section 11A referring to the Head Notes, as under: Demand must be preceded by a show cause notice within the prescribed period of limitation--Show cause notice issued earlier relating to the question of reclassification of goods only and making no demand for differential duty for past period--Demand issued straightaway subsequently not regardable as being in

continuation of earlier show cause notice--Section 11A(1) of Central Excises and Salt Act, 1944.--Any proceeding under Section 11A involves three stages: (i) issue of a show cause notice, (ii) adjudication by competent authority, and (iii) issue of a demand to recover the duty. The other important requirement of the provision is that the notice itself must specify the amount liable to be paid by the assessee and the adjudicating authority has to determine the actual amount of central excise duty that may become payable after considering the representation made by the person concerned. and Referring to the above he pleaded, the demand was not sustainable.

In this connection he also referred us to judgment of the Hon'ble Karnataka High Court , referred us to 32. As already referred to in detail, as per the dictum of the Supreme Court and the ratio laid down in J.K. Cotton Mills' case , any recovery of duty not levied and not paid or short-paid for a period beyond six months in subject to the limination prescribed in Section 11A(1) and should be recovered strictly in accordance with the provisions of Section 11A, including the procedure prescribed therein.

33. Therefore, the observations made by their Lordships in Paragraph 32 of the Judgment in J.K. Cotton Mills case-provides the key to the understanding of the provisions of Section 11A and is a complete answer to the stand taken by the Department and the arguments of its Counsel, in this case.

34. It is best to reproduce what their Lordships said in their own words thus: 32. Under Section 11A(1) the excise authorities cannot recover duties not levied or not paid or short-levied or short-paid or erroneously refunded beyond the period of six months, the proviso to Section 11A not being applicable in the present case. Thus although Section 51, Finance Act, 1982 has given retrospective effect to the amendments of Rules 9 and 49, yet it must be subject to the provision of Section 11A of the Act. We are unable to accept the contention of the learned Attorney General that as Section 51 has made the amendments retrospective in operation since Feb. 28, 1944, it should be held that it overrides the provision of Section 11A. If the intention of the Legislature was to nullify the effect of Section 11A, in the case, the Legislature would have specifically provided for the same. Section 51

does not contain any non-obstante clause, not does it refer to the provision of Section 11. In the circumstances, it is difficult to hold that Section 51 overrides the provisions of Section 11A. 35. In addition to the ratio laid down by the Supreme Court in the above case, the answer to the Department's contention would not complete without reference to the earlier decision of the Supreme Court in Gokak Patel case . The facts of that case would be relevant to be stated before adverting to the view expressed by their Lordships in that case.

36. The petitioner (appellant) has challenged the demand made by the Asstt. Collector of Central Excise for the period 20.6.1976 to 28.2.1981 in the writ petition before High Court. The writ petition was dismissed on 16.2.1981 before the High Court of Karnataka.

During the pendency of the writ petition the High Court had stayed the collection of excise duty from the petitioner. After the disposal of the writ petition, the department issued a demand to recover the duty for the period covered by the stay order. This demand was challenged by the petitioner before the High Court on the ground that the demand was not preceded by a show cause notice as contemplated under Section 11A(1). The High Court dismissed the writ petition and on appeal by the assessee to the Supreme Court, it was held that without issue of show cause notice and without determining the duty liable to be paid, no demand to pay the duty can be issued, The demand made against the petitioner was held invalid and unenforceable by the Supreme Court and the demand was quashed and the duty paid was directed to be refunded to the assessee.

37. The Supreme Court observed in the course of the order that there was no interim direction by the High Court in the matter of issue of notice for the purpose of levy of duty for the period in dispute and no such notice was issued by the Department during the pendency of the writ petition. What was stayed by the High Court was only the Collection of central excise duty as a fabric and the writ petition was disposed of directing the petitioner to urge all the contentions before the Department in reply to the show cause notice. It is on these facts the Supreme Court categorically held that the issue of show cause notice to recover any duty not paid or short-paid for a period of beyond six months, was mandatory. The

Department lost the revenue for failure to issue show cause notice in that case.

38. He pleaded that Section 11A applies in all cases. As to the constructive res judicata as pleaded by the learned Senior Central Government Standing Counsel, the learned Advocate for the petitioners Shri Setelvad referred us to the judgment of the Hon'ble Supreme Court in the case and referred us to part A of the Head Notes which is reproduced below for convenience of reference: (A) Civil P.C. (5 of 1908), Section 11. Epln. IV--Writ Petition--Res judicata--Petition challenging commercial use of a plot reserved for bus depot dismissed--Subsequent writ petition for similar purpose challenging commercial user on a ground absent in earlier petition--Judgment in earlier petition would nonetheless operate as res judicata A. No. 644 of 1982 and Order S. W. P No. 2412 of 1982, D/14.11.1983 (Bom), Reversed. (Constitution of India Article 226).

In this connection he referred us to the observations of the Tribunal in their order under which the classification under 19-III was not held to be applicable which order was taken up before the Hon'ble Supreme Court in appeal. He has pleaded in para 17 of the Tribunal's order one of the Tribunal Members who wrote the minority judgment has clearly stated that the question of demand did not arise in the Order-in-Original and that it was merely a question of classification of product. The above para 17 is reproduced for convenience of reference: 17. Next question raised by the respondent company is regarding the demand being hit by limitation inasmuch as no show cause notice of demand has been issued by the department. We are unable to deal with this point because we that the question of demand did not arise in the order in original. It was merely a question on classification of product whether it fall under T.I. 19-III. Therefore, this is a question which is required to be taken up separately by the respondent company and get a speaking order from the lower authority before the matter can be dealt with at our level.

39. He has pleaded that the order on classification passed by the Assistant Collector on 4.5.87 was in pursuance to the show cause notice which was issued on 6.4.87 consequent on the directions of the Hon'ble High Court while dispensing of the appellant's writ petition. This order of the Assistant Collector was appealed

before the Collector (Appeals) and which ultimately went before the Tribunal. The majority view in this regard was reflected in para 28 in the case of the appellants . He has pleaded that the decision of Hon'ble Member Shri P.C. Jain who gave the minority judgment remains i.e. the order of the learned lower authority which was impugned before them i.e. order of the Assistant Collector dated 4.5.87 was only an order on classification.

40. He has pleaded that it was the Department which has filed an appeal before the Hon'ble Supreme Court and in the Grounds of Appeal which have been filed in the paper book filed by the appellants at p-236, all grounds urged are only on the point of classification and the majority judgment has been assailed on various grounds of law and fact. The appeal of the Department was allowed on the point of classification. He has pleaded that the findings of the Member Shri P.C. Jain in para 17 were not at all assailed. He pleaded that the issue of classification is of general importance and, therefore, the proceedings which culminated with the judgment of the Supreme Court, even if as a result of the judgment did not fructify into any demand cannot be called futile. The issue of demand being barred had already been raised before the Collector (Appeals) against the order of demand raised by the Assistant Collector vide letter dated 20.7.87. He, therefore, pleaded question of constructive res judicata would not apply.

41. We have given a careful thought to the pleas made by both the sides. We observe both the appeals relate to the same facts. The orders impugned before us are by two different Collectors, one by Dr. S. N. Busi and the other by Shri Moheb Ali. One relates to the demand and the other relates to the attachment of the properties.

We first take up the issue relating to the demand. Notice of demand impugned before the learned Collector was C. No. V/59/17/2/87 VC-II dated 16.11.94 passed by the Assistant Collector, Hyderabad I Division. This notice of demand was issued after the issue regarding classification of the appellant's case came to be finally decided by the Hon'ble Supreme Court. The controversy revolves around the status of this demand notice and whether the demand is maintainable in law in terms of Section 11A of the Central Excise Act, 1944. The origin of the events

which led to the issue of this demand notice lies in 1981 and for a proper appreciation, therefore, a note has to be taken of what transpired before this date i.e. 16.11.94 the date of issue of this demand. We have to examine as to the legal import of what transpired at different stages of the controversy as it developed and the various orders which came to be passed till issue of the demand notice dated 16.11.94. The legality of the demand will have to be considered in the light of the various judgments cited before us taking into consideration the various orders and the events which took place between 1981 and 1994.

42. The origin of the controversy is the letter of the appellants dated 9.3.81 which is reproduced below for convenience of reference: We are a unit processing to roll leather cloth in Patanchoru and have been duly paying excise duty under Tariff Item No. 19.

The process involves impregnating Cotton Cloth with Plastic Materials. However the head note under this item requires the weight of cloth in the end product to do not less than 40% by weight.

Inasmuch as the weight of cloth in our products is far less than this weight, we are not liable to pay excise duty under this item.

We therefore request you, to duly advise us in respect of refund of excise duty erroneously collected in the past and advise us of future procedure.

43. Thereafter, they filed a writ petition and vide order dated 3.4.81.

In Writ Miscellaneous Petition No. 3225/81 they obtained an interim order. Their prayer in the writ petition was for direction to the respondents i.e. the Department, for decision on the classification after taking of note of the objections raised by them in their letter dated 9.3.81 and for direction for the department not to collect the excise duty on the products manufactured by the appellants and to allow the clearance on the appellants furnishing a security. The Hon'ble High Court allowed the appellants by this interim orders to pay the excise duty under Tariff Item 19(i) of the First Schedule of the Central Excise and to furnish a Bank Guarantee for the difference in duty that would be otherwise payable if assesment was done under

Tariff Item 19(iii) or the purpose of clearance of the goods. While this order came to be passed, the appellants filed a classification list also on 18.4.81 classifying the goods under 19(iii) and which was so approved as seen from the final order passed by the Hon'ble High Court on the Writ Petition filed by the appellants dated 18.3.87. The Hon'ble High Court in this order has stated that "after sending the letter dated 9.3.81, the petition had submitted a classification list on 18.4.81 wherein the petitioners goods were classified as 'cotton fabrics coated with artificial and other plastic materials manufactured out of duty paid base cotton fabrics' and the said classification was approved by the first respondent on 30.4.1981". The Hon'ble High Court has gone on to further add that there is really no dispute whatsoever. Virtually it goes to the department having accepted the classification list submitted by the first petitioner on 18.4.81 and that it was rather intriguing what the matter to be resolved in the writ petition is. We observe that these latter observations are significant and will be referring to this in our subsequent discussion.

44. It is seen from the last para of the order of the Assistant Collector which was passed after the writ petition had been decided had been decided (vide his order dated 4.5.87.) that he has confirmed the classification as was approved under 19(iii) in the classification list which were accorded approval on 30.4.81 (classification list filed on 18.4.81) and another one which was approved on 25.5.83. Thus what emerges is what while the final decision on the appellant's writ petition was pending, the authorities had granted approval for the classification of the goods under 19(iii). The approvals granted on these classification lists and the orders passed on these classification lists were not challenged by the appellants nor the department approached the Hon'ble High Court for vacation of the interim order was earlier passed on 13.4.81 directing the department to allow clearance collecting part of the duty in cash and securing the part by Bank Guarantee, by bringing it to the notice of the Court that subsequent to that order the classification list had been filed by the appellants under 19(iii) and they were approved so. In spite of the approval of the classification above the clearance at that time were allowed collecting the duty at the rate applicable under Tariff Heading 19(0 and the Bank Guarantees were obtained from the appellants from time to time for lump sum amounts as seen from page-118 in the paper book which is an annexure with

the letter of the Assistant Collector bearing No. C. No. V/59/17/2/87 VC-II dated 13.8.87. The goods were, therefore, continued on to be cleared on this basis. It is, however, seen that the letter of the Additional Collector, Shri M.V. S. Prasad dated 23.12.1985 (page 168 of paper book) wherein the learned Additional Collector has pointed out that the goods are being allowed clearance in terms of the order WMP No. 3225/81 of the Hon'ble High Court of Andhra Pradesh and that an amount of Rs. 3.75 Crores had accumulated in terms of Bank Guarantees for the period June. 1981 to October, 1984. In para 2, the learned Additional Collector referred to the situation in the country and invoked the national interest with a request to the appellants for payment of the differential duty in terms of the Hon'ble High Court's order either provisionally or under protest of on 'account' without prejudice to their legal claim pending before the Hon'ble High Court of Andhra Pradesh till the disposal of the petition. It is also mentioned that this provisional/under protest payment will not amount to their accepting the department's contention, it will be purely in the interest of the country.

45. Another letter was written by the then Collector Shri R.Gopalanathan dated 25.8.86 (page 167) wherein the learned Collector referred to the discussions with the appellants about Government's vigorous drive for collecting revenue tied up on various counts and referred to the amount of Rs. 7 Crores which have accumulated on account of Bank Guarantees and he requested them to pay certain amounts provisionally in August and September without prejudice to the appeal pending before the Hon'ble High Court and it was mentioned that the provisional payment will not amount to the appellant accepting the department's contention and will be subject to the outcome of the writ petition pending. The appellants agreed to make certain payments vide the letter of the Managing Director dated 29.12.1986. While referring to certain payments which were made earlier at the request of the Department, it was pointed that these payments were made under protest without prejudice to their contentions before the Hon'ble High Court and this not being taken as acceptance of the contention of the Department.

46. While the matter were at this stage, the Hon'ble High Court disposed of the writ petition on 18.03.87. The Hon'ble High Court in its order has clearly observed that since subsequent to the letter dated 9.3.81, the classification list filed by the

appellants wherein they had described the goods as cotton fabrics coated with artificial and other plastic materials manufactured with base cotton fabrics and the classification has been approved under 19(iii), virtually it comes to the department having accepted the classification list submitted by the first petitioner as this classification list was approved on 30.04.81, therefore, question of any controversy regarding classification being there did not exist. However, as a concession made by the Department that they are prepared to decide the classification of the goods afresh in the light of the submissions which were made by the appellants in their letter dated 9.3.81 to the Assistant Collector, the Hon'ble Court directed the department to dispose of the appellants objections if any raised in the letter dated 9.3.81 taking into account the classification list filed on 18.4.81. In short, what was ordered by the Hon'ble High Court was re-consideration of the approved classification list.

47. The Assistant Collector, therefore, in pursuance to this direction issued a letter dated 16.04.87 to the appellants to make a representation as to why the goods should not be classified under 19(iii). The said Assistant Collector was of the view for the reason set out in the letter with the approval of the classification accorded in respect of the finished goods manufactured by the company in their communication C. No. V/19/1/9/81 VC dated 30.4.81 w.e.f. 18.4.81 was in order and did not appeal to have any further revision. In short the approval earlier granted was sought to be reaffirmed in terms of the directions of the Hon'ble High Court for consideration and decision after affording the appellants an opportunity. The appellants made their representation in the matter raising various objections and sought for holding that the goods were not liable to pay duty under Tariff Heading 19(iii) and sought for the refund of the amount which had already been paid. The Assistant Collector, thereafter passed a formal order which is described as Order-in-Original bearing No. C.No.V/59/17/3/87 VC-II dated 4.5.87 and after giving his reasons in the concluding portion he has stated as under: In view of the foregoing I confirm that the subject goods fall under tariff item No. 19 and approval of the classification lists accorded in this office files: to the two units of the company situated at Patanchoru and Nandigaon, Medak respectively to in order and do not warrant any revision. The company shall pay the relevant duty on the goods manufactured by them accordingly and question of granting refund of the

duty to the company does not arise.

Hereagain, it is seen that the Assistant Collector has reaffirmed the classification under 19(iii) and that the approval earlier granted in the office files as mentioned above i.e. approval of the classification list was in order and did not warrant any revision.

48. Position, therefore, that emerges from the above is that the classification of the goods stood approved under Tariff Heading 19(iii) while the approval on 30.4.87 granted as above with effect from 18.4.81 and the other for a later period, were legally enforceable. These orders of approval as above had not been challenged in appeal by the appellants nor they had challenged the same before the Hon'ble High Court nor the Hon'ble High Court had been informed by the Department about these approvals having been granted and the order of stay granted in the context of the letter dated 9.3.81 was not also sought to be vacated by the Department. The Hon'ble High Court in the final order have also taken note of the fact that the subsequent filing of the price list by the appellants on 18.4.81 by deciding the goods as coated fabrics and getting the approval for the classification of the same under 19(iii) left no room for controversy while on a concession by the Department allowing the reconsideration of the said classification after considering the objections, if any, of letter dated 9.3.81 and opportunity to the appellants to put forth their plea for classification otherwise than under 19(iii). The Assistant Collector also in his order dated 4.5.87 has not referred to these approvals granted as if these were provisional in character and not final and has merely stated that these approvals did not warrant any revision. Thus so far the departmental authorities are concerned, at the relevant time seal of finality had been given to the classification under Tariff Heading 19(iii) by the approval orders dated 30.4.81 and 25.5.83. The reconsideration of the same was done only in terms of the order of the Hon'ble High Court and the Department's concession made before the Hon'ble High Court. So far as the observations of the Hon'ble High Court that nothing remained after the approval was granted for classification of the goods under 19(iii) on 30.4.81 for consideration of the Hon'ble High Court are quite significant. What can be read from this is that these approvals granted were legal and action for demand of duty in terms of these approvals could be taken. However, the

Hon'ble High Court as a part of the concession made by the Department to reconsider the issue of classification based on the representation made by the appellants, directed this to be done. We observe that no plea has been urged by the revenue so far as the legal status of these approvals are concerned.

49. We observe that after re-affirming the classification as held by the order dated 4.5.87, the Assistant Collector proceeded to issue a demand notice on 20.7.87. In the meantime the appellants had filed appeal to the learned Collector (Appeals) against the order of classification on 4.5.87 and after the receipt of the demand they also filed additional grounds and in which before the Collector (Appeals) they took a plea that demand was not sustainable under Section 11A for various grounds. Before the above proceedings were, it is seen that by the letter dated 23.12.85 from the Additional Collector and also from the Collector vide his letter dated 26.12.86 and reply thereto dated 29.12.86 a plea was made to the appellants to make the payments which had aggregated by way of Bank Guarantees in cash in view of what has been described as national interest by the Additional Collector and on the plea of revenue mobilisation by the Collector and the payments in these letters which were made clear to the appellants that this payment which could be made could be treated either as provisional or under protest or "on account" without prejudice to their legal claims pending before the Hon'ble High Court at that time. The Collector stated as under in this regard: I request you to kindly pay the differential duty amounting to Rs. 3 Crores provisionally without prejudice to your claim pending before the Hon'ble High Court.

provisional payment will amount to your accepting the department's contention and will be subject to the outcome of the writ petition pending in the Andhra Pradesh High Court.

50. It is thus seen that these payments which were made and which were requested to be made were not as part of the legal obligation which was cast on the appellants but were by way of separate arrangement with the assessee to bring on record extra revenue. These payments, on the basis of which they were requested to be made were not legally asked for as duty but in lieu of the Bank

Guarantees without any prejudice to the rights of the appellants. There is no plea from the revenue that assessments were done provisionally. These payments, therefore, could not be considered as part of the payment of duty. In this connection, the learned Advocate for the appellants Shri Setelvad referred us to the judgment of the Allahabad High Court reported in AIR 1957 759 (All.), the relevant Head Notes which we have reproduced in para 16 of this order. He has pleaded that there is a clear distinction between the amount deposited and amount appropriated as duty. Further, he referred us to the judgment of the Punjab and Haryana High Court in the case of Deepchand Jain v. Income Tax Officer, C-Ward, Ambala, and Ors.

reported in 1983 (145) ITR 676. The relevant extract again we have reproduced in para 16 above wherein it has been held that advance tax collected had to be related to the final assessment order and since no final assessment order could be passed the same having been barred by limitation, the collection of the advance assessment itself have become illegal. In the same context, he referred us to the Government of India's order reported in 1980 ELT 655.

51. While on this we observe that a regard will have to be had as to how the payments as made by the appellants were looked upon by the departmental authorities. In this connection, the letters of the Additional Collector and Collector referred to by us earlier, dated 23.12.85 (page 168 of paper book) and 26.12.86 (page 166 of paper book) clearly shows that the authorities while asking for the deposit amounts secured by Bank Guarantees to be paid in cash have clearly informed the appellants that this payment will be "either provisionally or under protest or on account" and the Collector has asked them to pay this amount provisionally without prejudice to the rights and the outcome of the writ petition filed by them. These letters are dated 23.12.85 and 25.8.86. Clearly these payments were not sought to be appropriated towards duty for these were amounts as have been paid under protest provisionally subject to their return depending on the outcome of the writ petition or to be held 'on account' which would only mean that this will be shown as to be kept on account of the appellants.

52. The learned Advocate for the appellants pleaded the amount which was demanded as duty was consequent on the passing of the final order on the writ petition by the Hon'ble High Court of Andhra Pradesh, after the decision on the classification list by the Assistant Collector in terms of the directions of the Hon'ble High Court. The Assistant Collector after issue of the letter dated 6.4.87 (p. 159 of paper book) passed an order on classification after giving an opportunity of hearing to the appellants, holding that the earlier approval of the classification of the goods under Tariff Heading 19(iii) granted vide his orders dated 13.4.81 and 25.8.83 did not warrant any revision. The communication dated 6.4.87 also related to the classification issue which culminated in the Order-in-Original dated 4.5.87 as above. The demand notice is, therefore, he pleaded for the first time was issued on 20.7.87 consequent to the decision of the Assistant Collector in his Order-in-Original dated 4.5.87.

53. We observe that in this background what has to be seen is whether this show cause notice as was issued for demand of duty which is designated as notice of demand dated 20.7.87 wherein it has been stated that consequent on the order of the Assistant Collector dated 4.5.87, the total duty payable by the appellants would be Rs. 7,21,84,788.35/- and the balance amount of demand was after making adjustment of the payments already made. This demand has been challenged by the appellants by filing additional grounds, in the appeal filed by them against the classification of the goods under 19(iii) by the order of the Assistant Collector dated 4.5.87. The Collector (Appeals) ruled in favour of the appellants on classification and entered a finding that he is not going into the aspect of non-issue of show cause notice before demand is confirmed by the impugned order which was one of the grounds urged in the additional grounds while registering the demand dated 20.7.87. This order of the Collector was taken up in appeal by the Department and a stay petition was also filed. The stay petition was not allowed by the Tribunal and the appellants asked the Collector in terms of the agreement which had been entered into during the discussion for the return of the amount already paid. Collector it is seen stated by his letter to the Assistant Collector with a copy endorsed to the appellants vide letter C. No. 1/ 10/41/81 LB dated 24.2.88 ordered for the payment of the amount after necessary verification and the department did return part of the amount which was already deposited after

making deduction for the duty that would otherwise be payable under Tariff Item 68. This amount was refunded by the letter of the Assistant Collector dated 15.4.88 by taking an undertaking under: the amount now refunded will be paid to the department on demand in case the appeal filed before the CEGAT by the Department is finally decided by classifying the goods under T.I. 19 III.54. The appellants gave the necessary undertaking as set out above in regard to the amount as set out above and also a further amount as set out in the communication of the Assistant Collector dated 7.6.88 wherein the following is set out: Since the refund issue is being settled provisionally at present, the issue of discount is not being considered. After verification of the invoices raised by you for the relevant period i.e. , from 1.4.1984 to 28.2.1986 in respect of both the units, it observed that you are entitled for a refund of Rs. 77,00,535.96 after deducting the amount of Rs. 3 Crores which was already refunded.

The amount of Rs. 77,00,535.96 is sanctioned provisionally without prejudice to the action proposed to be taken under this office Show Cause Notice dated 29.3.1988 and the decision of the CEGAT in the Appeal filed by the Department.

The refund Cheque will be issued after furnishing an undertaking on Rs. 5/- Stamp Paper to the effect that 'the amount now refunded will be paid on demand in case the appeal filed by the Department before CEGAT, New Delhi on the classification of the subject goods is finally decided.' 55. Before the Collector (Appeals), by way of additional grounds, the appellants have urged the following grounds: 1. The notice of demand dated 20.7.87 has been issued without jurisdiction. Section 11A of the Act which alone is the provision under which the respondents can levy and recover the duty in the present case statutorily provides for issuance of a show cause notice prior to raising of demand. In the present case, no show cause notice has been issued instead a outright demand has been served. Hence, the notice of demand per se is illegal according to the decision of Supreme Court in .

2. That in any event, the demand raised in the present case is barred by limitation. In the present case, an interim stay order dated 3.4.81 of this Hon'ble High Court merely directed the respondents not to collect the Excise Duty. Hence, the stay was in relation to the collection of Excise Duty only. There was no stay or direction

of the High Court in the matter of issuance of notice for the levy of Duty. The respondents were not at all precluded from issuance of notice for carrying out the levy, in terms of provisions contained in Section 11A of the Act. Consequently, the notice of demand now raised is wholly unsustainable. The petitioner in this case is directly covered by the decision of the Supreme Court in the Gokak Patel Volkart v. CCE where under identical circumstances, the Supreme Court held that the notice of demand was barred by limitation.

56. We observe that while the issue on classification came to be settled by the judgment of the Hon'ble Supreme Court dated 27.6.94. The appellants objections raised against the demand notice dated 20.7.87 before the Collector (Appeals) remained still open. Tribunal by the judgment by a majority decision confirmed the order of the Collector (Appeals) and Member Shri P.C. Jain, in para 17 of the judgment clearly stated that the issue of demand did not arise in the Order-in-Original i.e. the order of the Assistant Collector dated 4.5.87 as it was merely a question on classification and that the question of the demand being hit by limitation and show cause notice not having been raised, will have to be taken up separately by the respondent company and they should obtain a plea in this regard. The said para 17 is reproduced below: 17. Next question raised by the respondent company is regarding the demand being hit by limitation inasmuch as no show cause notice of demand has been issued by the department. We are unable to deal with this point because we find that the question of demand did not arise in the Order-in-Original. It was merely a question on classification of product whether it fall under T.I. 19 III. Therefore, this is a question which is required to be taken up separately by the respondent company and get a speaking order from the lower authority before the matter can be dealt with at our level.

57. The majority judgment in para 28 took note of the arguments of the appellants before us regarding the demand being time barred in view of the judgment of the Hon'ble Supreme Court in the case of Gokak Patel but no findings were given in this regard in view of the decision given on the classification in favour of the assessee and it has been stated that such findings would be redundant. It is thus seen that the only view that survives is that of Member Shri P.C. Jain, who has stated that the issue before the Tribunal was only related to the classification.

Hereagain, what emerges is that only classification issue came to be decided by the Tribunal and which issue was finally settled by the Hon'ble Supreme Court.

58. Subsequently, after the judgment of the Hon'ble Supreme Court, the authorities proceeded to demand the amount which was given back to the appellants, amount of Rs. 3,77,535.96 by the letter of the Assistant Collector dated 19.08.94 (page 69 of the paper book) and communication dated 16.11.94 designated as notice of demand issued to them indicated an amount which was due to be paid following the decision of the Hon'ble Supreme Court (Page 53 of paper book). The plea of the appellants is that this demand as was raised was as per the letter of the Assistant Collector dated 20.7.87 and subsequently after the judgment of the Hon'ble Supreme Court on 16.11.94 could not have been raised under Section 11A of the Central Excise Act, 1944 for the reason no show cause notice was issued for the same and that the demand was barred by limitation. It is this point which are raised by the appellants which we are called upon to address. In this connection, therefore, we have to examine the import of the interim order which was passed by the Hon'ble High Court of Andhra Pradesh dated 3.4.81. Para 2 of the order is reproduced below: Order: The petition coming on for orders, upon perusing the petition and the affidavit filed in support thereof, the petition in the Writ Petition and upon hearing the arguments of Mr. Jasti Chalameswar, Advocate for the Petitioners. It is ordered: that notice do issue to other Respondents herein to show cause why this application should not be complied with and It is Further Ordered that on condition that the petitioners herein pay excise duty under item 19(1) of the First Schedule to the Central Excise and Salt Act and furnish Bank Guarantee for that balance of excise duty payable at the rate of 50 per cent the respondents herein namely Asstt. Collector of Central Excise, I.D. O., II Division, be and hereby are directed not to collect the Excise duty on the products of petitioners and permit the petitioners to remove their product from the factory premises, pending further orders on this petition.

59. It is seen from the above that the restraint placed was from collection of the excise duty under Tariff Item 19(iii), but the interest of revenue was secured by asking the appellants to pay the duty as applicable under Tariff Item 19(0 and for the differential duty by execution of a Bank Guarantee (i.e., the difference of duty

as chargeable under Tariff Item 19(iii) and 19(i).

60. The plea of the learned Advocate for the appellants is that the department was restrained from collecting the duty under Tariff Item 19(iii) and were required to collect duty only as applicable under Tariff Item 19(i). The restraint, he pleaded was only on the collection of the duty and not on the levy.

61. We observe that the decision regarding collection and levy being two separate factors in the context of the Central Excise is now well settled. The collection, we observe follows levy. The department in the above view was not restrained from levying the duty. In this connection the learned Advocate for the appellants has pressed into service the ratio of the decision of the Hon'ble Supreme Court in the case of Gokak Patel . We observe in that case the collection of duty on the fabric was stayed by the Hon'ble High Court by ordering the assessee to pay the duty of excise as yarn and were required to maintain an account for future clearance. The relevant portion in para 2 and 4(2) are reproduced below for convenience of reference: Pending disposal of the aforesaid Writ Petition, it is ordered by this Court that collection of excise duty as a fabric be and the same is hereby stayed. It is further ordered that the petitioner shall however continue to pay excise duty as yarn and shall further maintain an account in square metres for future clearance.

Reference to Section 3 of the Act which contains the charging provision clearly shows that levy and collection are two distinct and separate steps. This Court in N.B. Sanjana v. Elphinstone Spinning & Weaving Mills Co. Ltd. ...The charging provision Section 3(i) specifically says "there shall be levied and collected in such a manner as may be prescribed the duty of excise." It is to be noted that sub-section (i) uses both the expressions "levied and collected" and that clearly shows that the expression "levy" has not been used in the Act or the Rules as meaning actual collection.' 62. Hon'ble Supreme Court in that case has clearly held that High Court having directed stay of collection have, therefore, not given any interim direction in the matter of issue of notice or levy of duty. And since the High Court did not grant stay of service of the show cause notice, the period during which the stay existed could not be excluded in terms of Section 11A and the Hon'ble Supreme Court held that since no notice were issued for the demand of duty

during the limitation of the period available in question and that outright demand had been served subsequently the demand was not sustainable. Since the notice for demand is the condition precedent, the demand could not be raised.

Paras 5 & 6 of this judgment are reproduced below for convenience of reference:

5. The High Court having directed stay of collection had, therefore, not given any interim direction in the matter of issue of notice or levy of the duty. The Explanation in clear terms refers to stay of service of notice. The order of the High Court did not at all refer to service of notice. Therefore, there is force in the submission of the appellant that the benefit of the Explanation is not available in the facts of the case.

6. No notice seems to have been issued in this case in regard to the period in question. Instead thereof an outright demand had been served.' The provisions of Section 11A(1) and (2) make it clear that the statutory scheme is that in the situations covered by Sub-section (1) a notice of show cause has to be issued and Sub-section (2) requires that the cause shown by way of representation has to be considered by the prescribed authority and then only the amount has to be determined. The scheme is in consonance with the rules of natural justice. An opportunity to be heard is intended to be afforded to the person who is likely to be prejudiced when the order is made before making the order thereof.

Notice is thus a condition precedent to a demand under Sub-section (2). In the instant case, compliance with this statutory requirement has not been made and, therefore, the demand is in contravention of the statutory provision. Certain other authorities have been cited at the hearing by counsel for both sides. Reference to them, we consider, is not necessary.

63. We observe that the facts in the present case are similar to the facts of that case. The Hon'ble High Court had restrained the Department from collection of duty under Tariff Item 19(iii) and had directed that on the appellants depositing duty as applicable under 19(i) subject to the execution of Bank Guarantee for the differential amount, the goods will be allowed to be cleared. The restraint as seen from the wording of the interim order was only on the collection of the duty. For the differential amount there was no restraint on the department for issue of the notice

for recovery of the balance amount under Section 11A. As held by the Hon'ble Supreme Court in this judgment, the collection of excise duty is a stage following the levy under the scheme of the Act and as in the present case, the Hon'ble Supreme Court noted there was no direction in the matter of issue of show cause notice for the purpose of levy of duty. The key is in this observation of the Hon'ble Supreme Court in para 4 of the judgment i.e.

the collection follows levy and for the purpose of levy a show cause notice is required to be issued.

64. In the present case, the demand has been raised for the first time on 20.7.87 after the Hon'ble High Court had passed final order on the writ petition with directions for reconsideration of the classification issue in the light of the appellants objections in their letter dated 9.3.87 for the clearances which were made upto February, 1986, which is the relevant period. No show cause notice as such has been issued and until 20th July, 1987. The demand made was clearly beyond the period of 6 months. In terms of the judgment of the Hon'ble Supreme Court in the case of Gokak Patel where the facts are similar to the present case, the demand, therefore, could not have been made both for the reason of non-issue of show cause notice and the demand notice having been issued as it is beyond the period of 6 months. A plea, however, has been taken by the revenue that by the reason of the Hon'ble High Court, the authorities were prevented from issue of Show Cause notice or raising the demand and in this connection, the learned Central Government Standing Counsel has relied upon the judgment of the Division Bench of the Madras High Court in the case of H.N. Marian and Ors. . The Hon'ble High Court in this case held that by reason of the injunction by the Hon'ble High Court for collection of duty the charge which was already fastened on the goods got postponed and the show cause notice could be issued after the injunction was dissolved. As rightly pointed out by the learned Advocate for the appellants, this decision was prior to the decision referred to in the Hon'ble Supreme Court in the case of Gokak Patel and this decision was rendered was in the context of Section 11A as against the decision of the Hon'ble Madras High Court in the context of Rule 10. We are not able to agree with the plea of the learned Senior Central Government Standing Counsel that this judgment would be

applicable to the facts of this case as we have held that the ratio of the judgment of the Hon'ble Supreme Court would prevail and will be applicable to the facts of this case.

65. However, in the present case, we find some peculiar features which have to be taken note of. The order of the Collector (Appeals) was taken up in appeal before the Tribunal and, thereafter, Tribunal's order was taken up before the Hon'ble Supreme Court. In the appeal before the Hon'ble Supreme Court, the appellants i.e. the Department in the grounds of appeal which have been filed in the paper book urged only the question of classification and the question of classification was answered in favour of the department. Thereafter, a notice of demand was issued vide Assistant Collector's letter dated 16.11.84 indicating the amount which was due to be paid for reason of the assessment of the goods under Tariff Heading 19(iii). The plea made on behalf of the department is that the whole issue was at large by reason of the appeal to the Hon'ble Supreme Court and, therefore, the demand made subsequent to the decision of the Hon'ble Supreme Court was sustainable in law. It has not been shown before us that the issue of the demand was before the Hon'ble Supreme Court or this point was decided either by the Collector or the Tribunal. Before the Collector (Appeals) the appellants had resisted the demand both on the ground of non-issue of show cause notice and also on the issue of time bar. It is a settled position as held by the Hon'ble Supreme Court in the case of Gokak Patel that collection follows levy. There has to be a levy before the collection of an amount could be done. The mechanism for levy and collection as provided for under Central Excise Tariff are different.

Section 11A provides for the mechanism for demand of duty in case it has not been paid or collected and this compliance with this legal provision of Section 11A is what has been ordained by the Hon'ble Supreme Court in Gokak Patel judgment.

66. In the present case, admittedly there was no demand raised for the amount remaining outstanding after payment of the duty by the appellants under Tariff Item 19(0 in terms of the interim order of the Hon'ble High Court whereby collection of the balance amount had been stayed. The Hon'ble High Court has not

restrained the department from the issue of the show cause notice for the collection of the balance amount.

67. The learned Advocate for the appellants pleaded that no doubt the appellants have executed Bank Guarantee for the differential amount and later at the request of the department paid the amounts. He has pleaded, these amounts were paid not as duty but as deposits and the department also understood the same in the like manner and the amounts collected as deposit could not be appropriated towards duty unless there was a levy in accordance with the provisions of the law. In this connection he referred us to the judgment of the Tribunal in the case of Indian Plywood . He referred us to para 17. We have considered the arguments of both sides. As the main crux of the argument on behalf of the appellant is whether there has been a levy according to law under Item 68 in respect of flush doors, it will be useful to examine the provisions of the Central Excises and Salt Act, 1944 and the Rules thereunder to see in what manner provision has been made for purposes of assessment. Section 3 of the Act provides:-- 3. Duties specified in the First Schedule to be levied.--(1) There shall be levied, and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in (India) and a duty on salt manufactured in, or imported by land into, any part of India.

Thus, Section 3 refers to both the levy and collection of duties of excise in the prescribed manner. The procedure for the levy and collection is mostly contained in the Central Excise Rules, 1944. At the relevant times the goods, falling under Item Nos. 16B and 68 were notified under Chapter VILA of the Central Excise Rules, 1944.

21. The catena of judgments cited by the Advocate for the appellant brings out one factor namely that merely because that some payment has been made by an assessee, it cannot be retained except when there has been a levy according to law. As rightly pointed out that levy has to be a 'legal levy'--vide Kesaram Cements case 1982 ELT 214 (AP) and the Lakshminarayana case 1974 33 STC. If an assessee makes a mistake of paying an amount which the department received without authority of law, it does not entitle the department to retain the sum--vide

Ceat Tyres case 1980 ELT 563. In the light of what we have set out regarding the procedure for the levy and collection of duty on excisable goods up to 1.3.75 flush doors were not excisable goods at all. There was no approved Classification List except one under Item 16B Central Excise Tariff which was determined by the Delhi High Court and then by the Supreme Court to be illegal. Hence there has been no legal levy under Item 68 of Central Excise Tariff in respect of the goods during the period in question. In fact the appellants claim for refund started with 21.7.73 when Item 68 was not even part of the Central Excise Tariff and the Classification List, then filed and approved could not by any stretch of imagination apply to Item 68 even by implication or by way of wrong indication. Therefore, it has to be held that there has been no legal levy under Item 68. as provided by the Act and the rules in so far as the goods vis-a-vis Item 68 are concerned.

68. He has pleaded, in the absence of demand of duty in terms of Section 11A within the time frame stipulated therein, that the demand raised by the department on 20.7.87, subsequently on 16.11.94 were barred by limitation. He has pleaded that the amounts which had been paid earlier were refunded to the appellants consequent on passing of the order by the Collector (Appeals) on assessment in favour of the assessee when the stay was not granted by the Tribunal subject to some reduction for levy of duty under Tariff Item 68. These amounts to return were returned of the deposit given by the appellants pending the decision on classification and these could not have been taken as appropriated as duty.

69. We observe that the judgment of the Hon'ble Allahabad High Court supports the view of the learned Advocate. He referred us to the Head Notes in question which is reproduced below for convenience of reference: Where the deposit is made in advance there is evidently an implied agreement that the amount would be refundable if not appropriated, and the depositor becomes a debtor for the purpose of the repayment of the money to the person entitled to get back the deposit. Under the circumstances the depositor is liable to make the refund at the place where the depositor resides. AIR 1940 All 243. Disting. (S) AIR 1955 Madh-B 96. Rel. on.

70. We observe as we have mentioned earlier that these amounts which are deposited at the request of the Additional Collector and Collector vide their letters referred to in our earlier paragraphs were for the purpose of helping the department to show augmented figures of revenue as provisionally or 'on account' and which were considered returnable subsequently. The course open to the department for recovery was by compliance with the provisions of Section 11A as held in the various decisions cited supra. The departmental authorities have apparently omitted to note the legal requirements when stay of only collection was granted for keeping their rights alive by issue of the show cause notice.

71. The learned Senior Central Government Standing Counsel in this connection has pleaded that the department could not have issued the show cause notice in view of the judgment of the interim order of the Hon'ble High Court and has pleaded that there had been substantial compliance in this regard. His plea is the duty to be paid had to be based on an order of classification and since the classification issue was pending decision on account of the writ petition filed in the Hon'ble High Court, the question of issue of show cause notice, therefore, did not arise. We, however, observe that as it is while the interim order was passed on 9.3.81. thereafter classification of the goods under Tariff Heading 19(iii) was approved based on the classification list filed vide Assistant Collectors' order dated 30.04.81 and subsequently dated 25.5.83.

72. The Hon'ble High Court of Andhra Pradesh while passing the final order on the writ petition filed have pertinently observed that since after filing of the letter dated 9.3.81 in which the appellants had raised some objections, the classification of the goods under Tariff Item 19(iii) and which later was cited in the writ petition for consideration before the deciding the classification of the goods, the appellants had filed a classification list for assessment of the goods under TI 19(iii) on 18.4.91 and which was approved on 30.4.91, "there is really no dispute whatsoever". 'Virtually it come to the department having accepted the classification list submitted by the first petitioner on 18.4.81. It is rather intriguing what the matter to be resolved in the writ petition is.' It clearly follows from this that a classification list stood approved for assessment of the goods under 19(iii) and which was not in challenge before the Hon'ble High Court and the Hon'ble High

Court of Andhra Pradesh also has by the above said observations affirmed this position. The pendency of the writ petition, therefore, cannot take away the legal effect of the approvals granted on 30.4.81 and subsequently on 25.5.83. If the department had not collected the duty at the rate applicable to Tariff Item 19(iii) after they had approved the classification list as above, they have themselves to blame for not raising the demand by issue of show cause notice in terms of Section 11A. The pendency of the writ petition and the passing of the interim order does not protect the interest of the revenue on this ground also. The argument of the learned Senior Central Government Standing Counsel in this regard for the above reasons is not acceptable.

73. The other plea of the learned Senior Central Government Standing Counsel that the classification, therefore, reached finality on 4.5.87 after the direction in the final order passed in the writ petition by the order of the Assistant Collector and for that reason Section 11A will only apply from that date is not acceptable in view of our discussion above as the ratio of the decision of the Supreme Court in the case of Gokak Patel and for the reasons we have recorded above.

74. The learned Senior Central Government Standing Counsel pleaded that the question of the liability arising out of the Hon'ble Supreme Court cannot be challenged on the principles of res judicata. He has pleaded that even though the department was in appeal before the Hon'ble Supreme Court against the order of the Tribunal, holding that the goods were not assessable under Tariff Item 19(iii), the appellants could have made a defence before the Hon'ble Supreme Court that Section 11A would apply to the demand and, therefore, for that reason the demand was barred by limitation and also for non-conformity with the parameters set out in Section 11A. He has pleaded that the consequences of the decision by the Hon'ble Supreme Court could have been perceived by the assessee and they should have, therefore, put forth this defence of Section 11A suo motto. His plea is that the Court's order could not be considered as a futile exercise. The point not having been taken, therefore, by the assessee before the Hon'ble Supreme Court, it acts as res judicata and the principles of constructive res judicata would apply. In this connection he referred us to the decision of the Hon'ble Supreme Court in the case of Sathyadhyan Ghosal and Ors. and referred us to para 7 which

is reproduced below for convenience of reference: (7) The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter--whether on a question of fact or a question of law--has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure: but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

He also referred us to the judgment of the Hon'ble Supreme Court in the case of Formard Construction Company and Ors. and referred us to para 20 which is reproduced below for convenience of reference: 20. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition.

Explanation IV to Section 11. CPC provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and

decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force.

He also referred us to the Judgment of Hon'ble Supreme Court in the case of The Direct Recruit Class-II Engineering Officer's Association and Ors. and referred us to para 35 which 35. Writ Petition No. 1327 of 1982 was argued by J.H. Bhatia, the petitioner, in person. He was directly recruited as Deputy Engineer Class II in July. 1959 and has challenged the constitutional validity of the 1978 Rules. Mr. Singhvi, the learned Counsel for the respondents, took a preliminary objection to the maintainability of the writ application on the ground that his claim stands barred by principles of res judicata. Admittedly, he was represented in W.P. No. 672 of 1981, filed before the Bombay High Court which was dismissed on 7.9.1981, upholding 1978 Rules. An application under Article 136 of the Constitution being numbered as S.L. P. No. 8064 of 1981 was filed from this judgment in representative capacity and was dismissed by this Court on 29.12.1981. These facts were not denied by the petitioner before us, and it was therefore contended on behalf of the respondents that so far the validity of the 1978 Rules is concerned, it must be held to be binding on the petitioner in respect of identical relief now pressed by him in the present writ case. The objection appears to be well founded. It is well established that the principles of res judicata are applicable to writ petitions. The relief prayed for on behalf of the petitioner in the present case is the same as he would have, in the event of his success, obtained in the earlier writ petition before the High Court. The petitioner in reply contended since the special leave petition before this Court was dismissed in limine without giving any reason, the order cannot be relied upon for a plea of res judicata. The answer is that if it is not the order of this Court dismissing the special leave petition which is being relied upon; the plea of res judicata has been pressed on the basis of the High Court's judgment which became final after the dismissal of the special leave petition. In similar situation a Constitution Bench of this Court in *Daryao v. State of U.P.* where the High Court dismisses a writ petition under Article 226 of the Constitution after hearing the matter on the merit a subsequent petition in the Supreme Court under Article 32 on the same facts and for the same relief filed by the same parties will be barred by the general principle of res judicata. The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law

on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under Article 226 passed after a hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32. An attempted change in the form of the petition or the grounds cannot be allowed to defeat the plea as was observed at page 595 (of SCR) : (at p. 1467 of AIR) of the reported judgment, thus: We are satisfied that a change in the form of attack against the impugned statute would make no difference to the true legal position that the writ petition in the High Court and the present writ petition are directed against the same statute and the grounds raised by the petitioner in that behalf are subsequently the same. *Forward Construction Co. v. Prabhat Mandal (Regd.)*, Andheri . further clarified the position by holding that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata.

75. He has pleaded that notice of demand had been issued on 20.7.87 and one of the Members' of the Tribunal in the judgment which went before the Hon'ble Supreme Court in para 17 has dealt with the issue of the demand. The appellants, therefore, knew he pleaded that the issue of demand was the factor mentioned in the Tribunal order. He has, therefore, pleaded that since this point of the demand being hit in terms of Section 11A, was not pressed before the Hon'ble Supreme Court, could not be, therefore, raised in the future litigations. He has, therefore pleaded, the issue stood decided between the two parties and principles of res judicata will apply. He pleaded that in terms of the judgment of the Hon'ble Supreme Court , ground which was available to be taken should have been taken before the Hon'ble Supreme Court and reiterated that limitation issue should be taken to have been decided. He further reiterated that this principle was followed in another decision by the Hon'ble Supreme Court reported in AIR 1960 SC 1607.

76. The learned Senior Advocate for the appellants Shri Setelvad pleaded that the question of constructive res judicata would not arise when the issue of demand was in terms of Section 11A was only referred and not discussed in the judgment of the Tribunal which was before the Hon'ble Supreme Court in appeal. The appeal decided by the Tribunal was on classification issue and it was that issue which went before the Hon'ble Supreme Court for a decision. In fact, Member Shri P.C. Jain, in his judgment has clearly mentioned that the question of demand will have to be dealt with separately. He has pleaded that the Department had not taken any plea against this observations of Member, Shri P.C.Jain and the findings in this regard remain as part of this judgment as the other Members did not deal with this aspect. It was, therefore, the responsibility of the department that the point of Section 11A raised which went along with the appeal, to raise this ground. He referred us in this connection to the grounds of appeal filed before the Hon'ble Supreme Court and pointed out that the only question urged before the Hon'bel Supreme Court was in regard to the classification of the goods and which fact has been noted by the Hon'ble Supreme Court in the opening para of the judgment which is filed at page 70 of the paper book. He has pleaded that the department's appeal was allowed and the natural consequences of the classification issue settled were, therefore, to follow under the law. He has pleaded that the issue of decision in the classification was of general importance and could not be taken as a decision inter parties. Even if no demand survived for other reasons, the judgment of the Hon'ble Supreme Court in this background could not be considered as futile. He in this connection also referred us to the judgment of the Hon'ble Supreme Court and referred us to part A of the Head Notes which is reproduced below for convenience of reference: (A) Civil P.C. (5 of 1908). Section 11. Expln. IV--Writ Petition Res judicata--Petition challenging commercial use of a plot reserved for bus depot dismissed--Subsequent writ petition for similar purpose challenging commercial user on a ground absent in earlier petition--Judgment in earlier petition would nonetheless operate as res judicata. A. No. 644 of 1982 and O.S. W.P. No. 2412 of 1982, D/14.11.1983 (Bom), Reversed. (Constitution of India, Article 226).

77. We observe that it was the department which was in appeal before the Hon'ble Supreme Court and it was their responsibility to take note of the issue that were

posed before the Tribunal. The appellants plea regarding the demand being not maintainable for noncompliance with the requirements of Section 11A had been taken note of in the judgment by one Member and while the other two Members did not choose to deal with this aspect. It was the revenue which the department sought to collect which was at stake and in fact the burden was on them to have urged this point also so that the judgment of the Hon'ble Supreme Court could be comprehensive on all the points. In any case, the classification issue is a general one of general application and that settles the law in respect of the classification for all the assesseees and, therefore, it cannot be said that the judgment of the Hon'ble Supreme Court was futile. The plea of the learned Advocate for the appellants in this regard in our view is well taken.

78. The ratio of the decision cited by the learned Central Government Standing Counsel i.e. in the case of Sathyadhyam Ghosal and Ors. cited supra in our view is not applicable as the issue decided by the Hon'ble Supreme Court was of general importance and not just inter parties.

Hence the finality reached was on the issue of classification. The collection and levy are two separate factors as held by the Hon'ble Supreme Court and the finality reached in the matter of classification would still leave the issue of levy and collection in terms of Central Excise Act open for adjudication.

79. As it is, the Tribunal while allowing the appellants appeal and relied upon another earlier judgment of the Hon'ble Supreme Court in the case of Multifibres v. CC and this judgment of the Tribunal was confirmed by the Hon'ble Supreme Court on appeal by the Department as reported in 1987 (20) ELT 481. It was because the Tribunal in the case of the appellants had followed the judgment of the Hon'ble Supreme Court and which decision was rendered by a Two Member Bench of the Supreme Court and since the ratio therein was under challenge by the Department, a larger Bench was constituted as seen from the narration of facts in the opening part of the judgment, in the case of this appeal filed by the department. It is thus clear that principle of classification was involved which had general application and of general importance which necessitated the constitution of the Larger Bench of the Hon'ble Court. It is not mere settlement of an issue inter

parties. In that view of the matter it cannot be said that the judgment of the Hon'ble Supreme Court just because by application of the parameters for demand under Section 11A no demand may urged would be futile. The judgment of the Hon'ble Supreme Court referred to by the learned Central Government Standing Counsel in the case of Sathyadhyam Ghosal and Ors. would not apply to the facts of this case as we have discussed above, the principles which came to be settled by the Hon'ble Supreme Court was of classification and which came to be decided after constitution of the Larger Bench of the Hon'ble Supreme Court. And it is only in respect of this decision the classification that the finality can be said to have reached.

80. So far as the demand of duty is concerned, in our view it was for the department to have taken a ground in this regard in view of the observations of one of the Members in the judgment in para 17 as mentioned above in para 56 of this order. The appellants could not be shut out from the remedy to resist the demand on the grounds urged before the authorities below and also which were taken note of in the judgment of the Tribunal. We, therefore, reject this plea of the department.

81. What follows from the above discussion is that by the application of the principles laid down in the judgment of the Hon'ble Supreme Court in the case of Gokak Patel, the demand as made by the demand notice dated 20.7.94 and subsequently on 16.11.94 was legally not tenable for reason of limitation and non-compliance with the parameters of Section 11A. The Hon'ble Supreme Court in the case of Union of India v. Madhumilan Syntex Pvt. Ltd. We have in our Order No. 1125/97 dated 25.04.97 in the case of CCE v. South India Structural Corporation following the ratio of the decision in the case of Gokak Patel have held as under:

4. We have considered the submissions. It is now seen that as per para 8 of the judgment, the Hon'ble Supreme Court has clearly stated that there was only direction with respect to the collection and there was no interim direction in the matter of issue of notice or levy of the duty. He, therefore, pointed out that issue of notice as well as levy of duty are two different events. In this case there is no injunction for the issue of show cause notice. The injunction is only with respect to levy and recovery. In the premises, we are of the view that since the Hon'ble High

Court has not given any interim injunction for the issue of show cause notice the period involved with respect to the injunction cannot be deducted in terms of Section 11A. In this view of the matter, we find no grounds to interfere with the impugned order and the appeal is dismissed.

82. The learned lower authority's order that the demand was a consequence of the judgment of the Hon'ble Supreme Court and that the same is not appealable or that the appellant's goods could be attached for reason of non-payment of duty, therefore, are not sustainable and we set aside the same. The appeals are therefore, allowed with consequential relief.

83. I have perused the orders passed by the learned Vice-President, allowing the appeal filed by the appellant. In the impugned order the learned lower authority held that the demand made in this case was a consequence of the judgment of the Hon'ble Supreme Court and, therefore, the question of time bar does not arise.

84. The plea of the learned Senior Central Government Standing Counsel was that the question of liability arising out of the Hon'ble Supreme Court cannot be challenged on the principles of res judicata. He has also pleaded that even though the department was in appeal before the Hon'ble Supreme Court against the order of the Tribunal, holding that the goods were not assessable under Tariff Item 19(iii), the appellants could have made a defence before the Hon'ble Supreme Court that Section 11A would apply to the demand and, therefore, for that reason, the demand was barred by limitation. He has pleaded that the consequence of the decision by the Hon'ble Supreme Court would have been perceived by the assessee and they should have put forth this defence. He also pointed out that the assessee was aware that such defence is required to be taken in this proceeding and the same was raised before the Tribunal. Therefore, he pointed out that when this plea having been taken before the Tribunal by the assessee, it was for them to have taken the same before the Supreme Court also. This plea not having been taken, he pointed out that the same is barred by the principles of constructive res judicata. In this connection, he has relied on the following decisions: The relevant portions of all these decisions are reproduced in the orders passed by the learned Vice-President at para 74. Therefore, I do not wish to reproduce the same again.

85. But the learned Senior Advocate appearing for the appellants contended that the question of constructive res judicata would not arise when the issue of demand was in terms of Section 11A and this point was not discussed in the judgment of the Tribunal which was before the Hon'ble Supreme Court. It was, therefore, pleaded that the appeal was decided by the Tribunal only on the classification issue and that issue alone was taken up by the department before the Hon'ble Supreme Court. It was also pointed out before us that in the order passed by the learned Member Shri P.C. Jain (Minority view), he has mentioned that the question of demand will have to be dealt with separately. It was also pointed out that the department had not taken any plea against this observation of the learned Member Shri P.C. Jain which is a part of this judgment. It was, therefore, pointed out that it was the responsibility of the department to take up this plea. In this connection our attention was brought to the grounds of appeal urged before the Supreme Court by the respondents, wherein only the classification issue had been challenged by the department. He, therefore, pleaded that the department's appeal was allowed and the natural consequences which arise therefrom is that the classification issue was settled. Therefore, he pointed out that no constructive res judicata is applicable to the facts of this case.

86. The learned Vice-President has held that the principles which came to be settled by the Hon'ble Supreme Court was of classification and which came to be decided after constitution of a Larger Bench.

Therefore, finality has reached only with respect to the classification. But as far as the duty demand is concerned, the department has to take a ground in this regard in view of the observations of the learned Member, Shri P.C. Jain, in the order of the Tribunal at para-17, therefore, the appellants could not be set out from the remedy to resist the demand.

87. With respect, I am unable to agree with this reasoning of the learned Vice-President. In my view, it is seen that the appellant was fully aware that the question of time bar was involved in this case. It is in view of this fact that the appellant raised this alternative plea of time bar before the Tribunal. But as far as the classification issue is concerned, the Tribunal in its judgment by majority held

the classification in favour of the appellant. The appellant at all relevant time was aware of the fact that consequent on the classification being finalised, the question of limitation also is involved in the case. Being aware of that fact, the appellant raised this aspect of limitation before the Tribunal. This fact of limitation which was raised before the Tribunal was also dealt with by the Tribunal in the above cited decision .

88. The learned Member Shri P. C. Jain, in para-17 of the order held as follows:
17. Next question raised by the respondent company is regarding the demand being hit by limitation inasmuch as no show cause notice of demand has been issued by the department. We are unable to deal with his point because we find that the question of demand did not arise in the Order-in-Original. It was merely a question on classification of product whether it fall under T.I. 19-111. Therefore, this is a question which is required to be taken up separately by the respondent company and get a speaking order from the lower authority before the matter can be dealt with at our level.

His was the minority view. His view of classification was ultimately upheld by the Supreme Court.

89. In the majority judgment also this aspect was taken note of. In para 28 of the order which is the majority order passed by two learned Members, it was held as follows: 28. The Counsel for the respondent during the course of the arguments submitted that the demand for duty was time-barred in view of the judgment of the Supreme Court in the case of Gokak Patel I note his arguments. I do not, however, give any finding on this subject in view of the decision we have taken that the classification of the product under Tariff Item 19 is not correct.

Such finding would how be redundant. However, these observations need not be considered as my views as I am not examining these points.

90. It is thus seen that in the appeal filed by the Collector of Central Excise before the Tribunal, the appeal was only with respect to the classification of the goods in question. Even in that appeal wherein the only issue raised was the classification of the goods in question, the appellant herein took the plea of limitation before the

Tribunal, it is thus seen that the appellants themselves were aware of the fact that this plea of limitation is incidental or is essentially connected with the subject matter of the dispute between them and it was for that reason they raised this issue before the Tribunal. It is thus seen that in para 28 of the Tribunal's order, which is a majority order, since the classification issue was held against the Department, the learned Tribunal held that in view of this finding on the classification issue, no finding with respect to the limitation is required to be given and such findings would be redundant. Therefore when the appellant having raised that issue before the Tribunal and the Tribunal did not give any finding as it was redundant in view of the findings on the classification, then it was for the appellants to have raised that issue before the Hon'ble Supreme Court in the appeal filed by the Department in this regard. It is not for the Department to raise that issue. The reason is that the Department is only in appeal against the classification issue and if a finding is given with respect to the classification then automatically the question of recovery will arise.

Therefore, the question of limitation is a matter which is required to be agitated by the appellant before the Supreme Court. The appellants were aware of this position and it was due to this fact that they raised this issue before the Tribunal. Therefore, they made the department also aware of the fact that this plea is a plea which they are required to take. Once when they have raised this issue before the Tribunal and when in the classification matter the issue went against the department in the orders passed by the Tribunal and when this order of the Tribunal was taken in appeal before the Hon'ble Supreme Court, then in my opinion., it was for the appellants to have contended before the Hon'ble Supreme Court that even if the issue of classification is held in favour of the department, the demand is hit by limitation. It is not for the department to contend the same before the Hon'ble Supreme Court and more particularly when the appellants themselves were aware that it was they who have to contend the same and they contended the same question before the Tribunal also.

91. Therefore, the decision of the Hon'ble Supreme Court in the case is clearly applicable to the facts of this case. In that particular case at para 20. the Hon'ble Supreme Court held as follows: 20. So far as the first reason is concerned, the

High Court in our opinion was not right in holding that the earlier judgment would not operate as *res judicata* as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition.

Explanation IV to Section 11. CPC provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other manner which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same things as if the matter had been actually controverted and decided. It is true that, where a matter has been constructively in issue cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force.

92. It is seen that an adjudication is conclusive and final not only as to the actual matter determined, but as to every other matter which the parties might and ought to have litigated and had it decided as incidental to or essentially connected with the subject matter of the litigation. Therefore, the question of limitation is also incidental or in other words is essentially connected with the disputed classification and being well aware of this fact the appellant rightly contended this aspect of limitation before the Tribunal. But the Tribunal did not give any finding in this regard. Since the classification issue went against the department as per the decision of the Tribunal, the department carried the matter by way of appeal to the Hon'ble Supreme Court. In the premises, it was for the appellant to raise this issue of limitation before the Hon'ble Supreme Court, as they rightly did urge the same before the Tribunal. Therefore, this matter being so essentially connected with the principle dispute of classification, it was for the appellants to have contended the same before the Hon'ble Supreme Court. In the premises it is seen that the principles underlying the principles of *res judicata* are applicable to the facts of this

case. The reason is this issue of limitation is constructively in issue and the appellant not having urged this issue before the Hon'ble Supreme Court, it is deemed to have been heard and decided against them.

93. In this view of the matter, it is seen that this plea of the appellant is clearly barred by principles of res judicata and, therefore, the demand issued by the Assistant Collector, is only in terms of the Hon'ble Supreme Court's order, and the appellants are bound to discharge the duty involved on the goods.

94. In the premises, the lower authorities are right in holding that the demand is not barred by limitation and the same is in consequence of the orders passed by the Supreme Court. Therefore, the question of limitation at this stage does not arise and this question is barred by the principles of constructive res judicata. This being the case, I am of the view that the appeals filed by the appellant is liable for dismissal and I order accordingly.

95. In view of the difference of opinion between the orders passed by the learned Vice-President and learned Member (Judicial), the Registry is directed to place the records before a Third member, who is not a party to the difference of opinion, whenever such a Third Member is available in this Bench (Vide Order No. 8/95 dated 16.11.1995) to resolve the following: Whether in the facts and circumstances of the case the demand is barred by limitation and the principles of constructive res judicata would not apply, as held by the Vice-President, for the reasons recorded by him: The appeal filed by the appellants is liable for dismissal notwithstanding the plea of limitation, on the ground that this plea is barred by the principles of constructive res judicata, as held by Member (Judicial).

1. The above difference of opinion between Hon'ble Brother Shri V.P.Gulati (Vice-President since retired) and Hon'ble Brother Shri T.P.Nambiar (Member since retired) is before me for consideration.

2. Heard Learned Senior Advocate Atul Setelvad and others for the appellants and Shri Muthukumaraswamy, Sr. Standing Counsel and Shri Sethuraman, Standing Counsel for the department.

3. Since the facts of the case are already on record in order per Hon'ble Shri V.P. Gulati, therefore, there is no need to repeat the same, though the Learned Senior Counsel for the appellants reiterated chronologically these facts. However, he submitted three basic conclusions based on these facts which are as follows:-- (i) No amount was paid as differential Excise Duty prior to 1987.

All payments made in 1987 were adhoc in nature, under protest, and in response to an appeal from the Collector, they paid something in the national interest. They were therefore not payments against legally levied and assessed duty for excise but only in the nature of adhoc deposits.

(ii) The Order-in-Original dt. 4.5.87 was only on the issue of classification of Rexin under the old Central Excise Tariff and no specific demand for duty under Section 11A adjudicated upon therein.

(iii) At no point of time and till today, any show cause notice demanding duty under Section 11A of Central Excise and Salt Act.

1944 has been received by the appellants. It was only on 20.7.87 that the department demanded for the first time certain quantified amounts to be paid. This document is bad in law because (a) it is not a show cause notice under Section 11A ibid and (b) it is time barred under that section.

(1) the amounts paid on the request of Collector of Central Excise in national interest are adhoc and not payment of excise duty of Rs. 5.73 crores because of the following:-- (i) from 3.4.81 to 18.3.87, the interim order of the Hon'ble High Court of Andhra Pradesh was holding sway, wherein it was clearly ordered that the department could not collect any differential excise duty. In view of this, neither the appellants could legally pay any amounts as duty nor the department could collect the same as excise duty as both were bound to obey these interim orders. Only the last payment of Rs. 15 lakhs being after this period i.e. 18.3.87.

is an exception to this fact. To justify and support this argument, he cited the decision of the Tribunal in the case of Indian Plywood Manufacturing Co. Ltd. v. CCE wherein this very Tribunal held that under the Self Removal Procedure (SRP)

system any levied duty has to be according to law, otherwise the payments received by the department cannot be retained. He also cited , wherein the Hon'ble High Court of Allahabad in the case of UOI vs Bhagwan Industries (para-5) that the export duty becomes leviable only when the export is completed and therefore amount of duty deposited prior to the completion of the export does not stand legally appropriated to Government towards levy of duty. In view of these, he argued that the letter of the Collector requesting for deposit of certain sums in lieu of Bank Guarantee in national interest and the conditions clearly mentioned in the payment letters of the appellants shows that payments made were not as duty but as adhoc deposits in national interest. He further cited the case of Deep Chand Jain v. Income Tax Officer and Ors. 145 ITR 676 wherein the High Court of Punjab & Haryana had held that no tax could be collected without the authority of law and as advance tax tantamounts to deposit of moneys without assessment and therefore the amount was refundable. He submitted that in the present case, there was no demand under Section 11A and no assessment on these payments and therefore amounts deposited were purely adhoc deposits and not duties of excise. He further cited case-law of Super Cassettes Industries Ltd v. CC wherein the Hon'ble High Court of Calcutta had held that pre-deposit of duty pending hearing of an appeal by the appellate authority under the Customs Act is not payment of duty but only a deposit and therefore, the limitations under Section 27 of the Customs Act, 1962 (Which corresponds to Section 11B of the CE Act) is not applicable, He submitted that in this case too, the moneys were only to be regarded as deposit and therefore not payment of excise duty. He further cited the order of the Govt. of India in the case of U.P Gandhi Smarak Nidhi as reported in 1980 ELT 655 wherein similar advance deposits would be governed by time limit limitations by General Limitation Act and not by Rule 11 of the Central Excise Rules, as the law that then stood. He further cited the case of Raj Sulphur Sugar Industries v. CCE as reported in 1983 ELT 2447 (CEGAT) wherein the Hon'ble Tribunal by a Larger Bench of three members held that advance deposit of duty under Rule 92 of the CE Rules is not hit by Rule 11 of the CE Rules because sum was kept in deposit with the Govt. and was not collected as an excise levy.

He therefore concluded that these payments were not paid as excise duty at all and therefore on the date when the Order-in-Original concerned was passed no

amount payment was paid as differential excise duty and therefore the department should have demanded thereafter the quantified demand in terms of classification decided in the Order-in-Original by issue of a show notice under Section 11A. Therefore, the adjudicating authority would have to apply his mind limitation therein, determine the duty due, pass a speaking order on this behalf. Only after these steps had been completed by the department any differential duty from the appellants would have become due. As against these steps clearly prescribed for by law, in the instant case, neither a show cause notice under Section 11A was issued nor was the amount quantified by speaking order under Section 11A(2) after following the principles of natural justice. Instead, by payment letter pre-emptive command was issued by the department to pay certain duty as mentioned thereunder. This was totally against legal provisions contained in the Act and the Rules.

(ii) Learned Senior Counsel for appellants further submitted that this very law point is also applicable to the refund of Rs. 3.77 crores given to them out of the said adhoc payments consequent to the Order-in-Appeal of the Learned Collector (Appeals) wherein the classification was decided in favour of the appellants. He argued that since the amounts consequently paid back to them had not been initially paid under a confirmed demand of excise duty under Section 11A and therefore they were paid back out of an initial adhoc deposit which was not absolute but the was conditional. What was refunded was not excise duty but certain adhoc deposits made. He cited the decision of three member Bench of Hon'ble Tribunal in the case of Doaba Co-operative Sugar Mills wherein in para-2 it was held since the rebate of duty of sugar export was as per statutory records and was paid in 1979 for export of 1977. Therefore, it was the case of erroneous payment and the limitation under Section 11A was applicable for recovery of such refund. It also held since there is no provision for granting any provisional refund under the Central Excise Law therefore any demand to recover such amount refunded can only be under Section 11A.. The Learned Sr. Counsel submitted that in their case no such notice exists which is within the time limit as prescribed under Section 11A. He further cited the case of CCE v. Malwa Sugar Mills Co. Ltd. wherein the Three Member of the Hon'ble Tribunal had similarly held. He therefore submitted in conclusion that as there is no demand under Section 11A for these

adhoc deposits paid back to them, therefore, there is no question of recovering thereof by the Government from the appellants.

(iii) Learned Sr. Counsel thereafter submitted that in the explanation to Section 11A the period which is ordered is to be stayed by a Court for service of notice is to be excluded from the time limit under that section. He submitted that interim order of the Hon'ble Andhra Pradesh High Court did not stay service of any show cause notice under Section 11A and the department was always free to issue such notices as what was stayed was only collection of duty which was secured in terms of Bank Guarantees. In support of his argument, he cited wherein in para 19 of the judgment, Hon'ble Supreme Court had held that provisions of Section 15 of the Limitation Act, which are on the same lines as the aforesaid explanation to Section 11A, would only be applicable where there is a clear order of injunction which stays the institution of the suit. He further cited the decision of the Hon'ble Supreme Court as in the case of Gokak Patel Volkart v. CCE as reported in 1987 SC 1161 wherein it was held that when the High Court had not given any interim direction staying the service of notice the benefit of this explanation under Section 11A(1) is not available. The Apex Court also held that it is incumbent on the department to issue a notice to the assessee under Section 11A before raising a demand and it a condition precedent. Learned Counsel submitted that all these facts enumerated in para 2 of this judgment shows that High Court of Karnataka had given an order which was exactly on the same lines as the order given by the Hon'ble Andhra Pradesh High Court in the subject case. He further argued that para 4 of this judgment clearly lays down that what was stayed by the Hon'ble Karnataka High Court in that case was only collection of duty and there was no direction of notice stayed. Further, para 5 & 6 clearly laid down that notice Section 11A(1) is to be issued necessarily and the duty determined as per Section 11A(2) which was not done in the subject case. He argued that this decision applies on all fours to the present facts of the case. He also cited the decision of Hon'ble Supreme Court in the case of J.K. Cotton as wherein it was laid down that provision for extension of time limit under the said Explanation to Section 11A because of stay granted by a Court is to be construed strictly and undue elasticity in this respect is not allowed. In para 13 thereof in the facts of the case, there was a stay of service of notice according to Revenue. However, Hon'ble Supreme

Court found that in terms of the order of the Delhi High Court it restrained the department only from giving effect to the contents of the directives of the Board letter dt. 24.9.80.

Therefore, the Hon'ble Supreme Court did not accept that the Collector of Central Excise was prevented from issuing a notice to the appellants under Section 11A. the test being that if the said Board's circular was not in existence, would the Collector have issued notice under that section. Because then by the suspension of the said circular the Court would not have prevented the Collector from issuing the notice. Learned Senior Counsel for appellants applied the same test here. It is clear that Hon'ble Andhra Pradesh High Court had simply stayed the collection of duty. This order has to be construed strictly and would therefore be mean that there was no stay on the issue of notice. Learned Sr. Counsel also cited the case of Tin Plate Co. as . wherein the Hon'ble Supreme Court in para 4 laid down that it was mandatory on the department to issue a notice quantifying the duty. He also cited the decision of the Tribunal in the case of Sundaram Fastners., as . He submitted that the facts of this case were parallel to the facts in the present case under consideration. This was because as per para 1 of the said judgment, a show cause notice was issued only for change of classification but no show cause notice was issued for demand of quantified duty. As per para 2 of the said judgment, it was held that first the Tribunal settled the issue of classification and therefore there was no question of any limitation arising therefrom. Para 3 of the said judgment goes to say that a show cause notice under Section 11A is necessary for demanding and collecting duty and since this was not done, the demand is time barred. In the instance case too, the show cause notice and the Order-in-Original concerned were for change of classification. Till today, no show cause notice under Section 11A has been issued for payment of duty as quantified therein, and therefore no demands survives on this matter, being time barred.

(2) Learned Senior Counsel then proceeded to submit his say on the question of Res Judicata. After explaining the provisions of Section 11 of the Civil Procedure Code in this behalf, he submitted that since no notice was issued in this case under Section 11A giving a quantified demand, therefore the main principles of Res Judicata is not applicable at all. Thereafter, he dealt with the question of

Constructive Res Judicata as contained in Explanation IV of Section 11 of the Civil Procedure Code. He submitted that two tests are laid down therein and both have to be satisfied for Constructive Res Judicata: His submission was that under Central Excise Law, the concepts of classification of goods, their valuation and assessment of duty are three different concepts arising out of different provisions in law as follows:-- (ii) price list is filed and approved under Rule 173C with respect to Section 4 of Valuation Rules thereunder; (iii) before removal of goods, the duty liability is determined under SRP by the assessee under Rule 173F; (iv) the procedure to be followed for payment of duty and removal of goods is under Rule 173G; and finally (v) the assessment of duty paid is done by the Proper Officer of Central Excise on the RT-12 returns under Rule 173I. This shows that classification is not only distinct from assessment but this procedure much prior to it. He further submitted that no provisional assessment is involved here. Instead, what was involved was that appellants disputed an existing classification on certain grounds and the said dispute was settled by the Order-in-Original against them. That is to say that only the matter of classification was agitated and adjudicated. In this connection, he cited again another case of Tin Plate Co. of India., as reported in 1997 (94) ELT 20 (SC), wherein the Hon'ble Supreme Court in paras 3 to 5 had held that issue in question was one of classification and did not relate to payment of duty nor was there a claim for payment of duty.

Hence the appeals were allowed. Applying this case-law to the facts of the present case. Ld. Senior Counsel argued that the department's appeal against the Collector (Appeals) order was only on classification and the issue of duty demand was beyond the scope of appeal itself as is cleared from para 17 of the minority order at page 161 of the Paper Book. Further more, when the issue was agitated by the department, in the Hon'ble Supreme Court, vide para 1 of their judgment, the Hon'ble Apex Court squarely refers to the issue as one of classification and hence in para 19 orders that the order of the original authority is restored which in effect means that classification decision of the original authority has been finally confirmed. In the light of these facts and the said case-law. Learned Senior Counsel proceeded to apply two tests of constructive res judicata as follows:-- (i) the matter of limitation was not possible to be raised in the proceedings before the Hon'ble Supreme Court for the simple reason that subject of demand being time

barred etc., was not a ground of an appeal and was therefore alien to the issue considered by the Hon'ble Supreme Court. Therefore, it was not possible (might) for the Supreme Court to have considered this issue as it would be going beyond the jurisdiction of the matter before it in appeal. The first test of possibility or "might" therefore fails.

(ii) regarding second second test whether the matter of limitation ought to have been raised, he submitted that appeal before the Supreme Court was filed by the department. The grounds of appeal clearly show that the matter of limitation was not raised. In this connection, he cited AIR 1949 Privy Council 143 and referred to para 20 of the said judgment that explanation 4 cannot be used to preclude the Government from raising any point. Applying this to the present fact, Learned Sr. Counsel argued that the Govt. could have raised issue of limitation before the Supreme Court but for the reasons best known to them, they did not do so. This does not mean that Government ought to have raised and therefore the second test also fails.

He also cited AIR 51 SC 155. In para 5 & 6 of the said judgment, it was held that since the question dealt with by the Hon'ble S.C was not one of interpretation at all therefore the doctrine of constructive res judicata was not attracted as the question dealt with was different. Learned Sr. Counsel argued that in this case also Hon'ble Supreme Court was only dealing with the issue of classification and not of payment of duty and therefore principles of constructive res judicata would not arise, with respect to demand for duty and also cited and AIR 1990 SC 185 (para 19). In the latter judgment in para 19 therein, it was held that when a court passes a judgment on one issue in a writ petition, no further question survive in that writ petition. Asking for any other relief was obviously premature at that stage and the Court did not at that stage go into other questions relating to further reliefs, like interests, that decision cannot therefore preclude the agitation on the question of interest subsequently on the grounds of constructive res judicata. The principles contained in the said judgment apply squarely to the present case. The Supreme Court had only considered the issue of classification. Therefore, further reliefs like limitation on demand of duty cannot be denied on grounds of constructive res judicata. He therefore concluded that principles of constructive res judicata was

not applicable to the facts of this case at all.

(3) Learned Senior Counsel thereafter submitted that on arriving at his opinion contained in the aforesaid order, Hon'ble Member (Judicial) had relied on 3 judgments. With regard to , he submitted that it did not deal with constructive res judicata at all and was therefore not relevant to the present issue. With respect to , he submitted that the said decision was not dealing with constructive res judicata at all and a plain reading of Headnote would clearly show that the case was distinguished on facts. With respect to , he submitted that though this judgment refers to constructive res judicata, it holds that the matter considered should have been incidental or essentially connected to the subsequent matter agitated. Ld. Senior Counsel argued that in this case the original issue was one of classification and the demands for duty under Section 11A was very distinct from this classification under Rule 173B and was therefore neither incidental nor essentially connected to the same. He therefore submitted that with great respect, he could not support the views of Hon'ble Member (Judicial) on this decision.

(4) Learned Sr. Counsel also submitted summary of these submissions in writing which have been placed on record. Concluding his argument, he pleaded that neither on limitation nor on res judicata does his case fail.

5. Heard Learned Senior Standing Counsel to Central Government. Shri Muthukumaraswamy alongwith others for the Revenue. Learned Senior Standing Counsel also submitted the facts of the case chronologically and submitted his points as follows:-- (a) It was not the department that sought to amend the classification of Rexin, instead the appellants disputed the said classification under 19(iii) vide then letter 9.3.81.

(b) The interim order of the Hon'ble Andhra Pradesh High Court refers to this letter dated 9.3.81 and orders conditional stay inasmuch as that the differential duty at the rate of 30% is secured as Bank Guarantee presumably because classification list is still in force classifying the product under 19(iii). Therefore, it is not correct to say that what the appellants had paid was not duty.

At this point Ld. Sr. Counsel for appellants rose to rebut that amounts paid by them were not as per the order of the Hon'ble High Court and was paid much after 1986 not during the relevant period.

During the relevant period, only the Bank Guarantees were submitted in compliance of this order. Therefore, this argument of Ld. Senior Standing Counsel is not correct on facts.

(c) Not only was earlier classification list in force. Another classification list was filed on 18.4.81 by the appellants albeit under protest classifying the product under 19(iii) and was duly approved by Revenue.

This was again contested by Ld. Sr. Counsel for appellants that the said classification list was filed on so as not to stop their clearances: it was under protest and subjected to Final decision on the writ petition by the Hon'ble Andhra Pradesh High Court.

Therefore, their contention on the classification under 19(i) continued to be alive as per their letter dt. 9.3.81.

(d) RT-12 returns submitted by appellants were assessed under item 19(iii) and the amount of differential duty quantified to enable them to file additional bank guarantees, therefore they cannot say that appellants were not aware of the quantification.

(e) that letter of the Additional Collector dt. 23.12.85 as well as the letter of Collector dt. 25.8.86 requesting them to pay certain amounts in national interest was in respect of covering the differential duty as mentioned therein. Since the Bank Guarantee given under orders of the Hon'ble Court was covering differential duty, any payments made against these would also automatically cover the differential duty.

(f) that the final order of Hon'ble Andhra Pradesh High Court itself notes that there is clearly no dispute whatsoever and this mean that imposition of levy was under 19(iii), the assessment of RT-12s was also under 19(iii), only the duty element upto 19(i) was paid by cash and the differential duty was covered by the Bank

Guarantee therefore any subsequent deposits against such a Bank Guarantee tantamounts to levy of duty.

(g) para 13 of appellants' reply to show cause notice admits that duties paid by them earlier under 19(iii) was erroneous; that the Order-in-Original clearly mentioned that duty should be paid accordingly and that no refunds are warranted because it confirms classification already made; that after the interim order rejecting the stay or the order of the Collector (Appeals). The appellants' letter to the Collector for refund clearly shows that the said refund was claimed against payments as differential duty against the Bank Guarantee.

(h) he referred to para 4 of letter dt. 15.4.88 of the department, wherein it is mentioned that refund is sanctioned without prejudice and argued that the word "refund" used means that it was a refund of duty on classification under 19(iii).

(i) he referred to the letter of undertaking of the appellants on which refund was granted and stressed that the words "being the refund of duty paid by us" clearly shows that initial payment was linked to classification and therefore refund given to them is for duty paid by them.

(j) regarding final order passed by the Tribunal, he argued that para-17 thereof had only the minority view and is therefore irrelevant, majority being at para 28 wherein there is no finding on limitation.

(k) coming to the order of the Hon'ble Supreme Court, he argued that the issue of limitation was not discussed therein. Though it is a part of the subject matter as it was raised before both the Collector and the Tribunal, particularly, as this problem ceased to exist after 28.2.86. He also argued that the Court decided the classification for adjusting the rights of parties and it was for the respondents to raise the question of limitation before the Supreme Court which they did not do so purposely as there was no merit in it.

(l) The letter dt. 16.11.94 of the Asstt. Collector is not a notice of demand but only a follow-up for the implementation of the Supreme Court order.

6. After having so dealt with the facts of the case, Learned Senior Standing Counsel submitted as follows:-- The amounts paid by appellants was in the nature of duty paid and not adhoc deposits because of the following reasons:-- (A) The Hon'ble Andhra Pradesh High Court's order was conditional and 30% differential duty was collected as Bank Guarantee.

Therefore, all amounts relate to Excise Duty which was first worked out and then the Bank Guarantees given from time to time. Therefore, since later payments were made in lieu of Bank Guarantee, they also relate to duty demand there is nothing adhoc about it.

(B) The appellants' payment of these sums is admittedly with respect to the differential duty secured under the Bank Guarantee and therefore payment under protest subjected to other rights, does not change the nature of payment as duty.

(C) Analysing the appellants' letter seeking return of the payment, he submitted that the claim for Rs. 4.26 Crores was paid out of the total sum of Rs. 7.21 Crores covered as Bank Guarantee. It was clearly mentioned therein that the Bank Guarantee for unpaid amounts was Rs. 2.95 Crores. All these shows that all the amounts were related to duty and in fact appellants offered to pay only Rs. 1.45 Crores on this account.

(D) He, therefore, argued that ultimately it is the nature of the amount paid is what matters and since in this case amounts were paid in relation to duty as was secured against the Bank Guarantee.

Therefore, one cannot now say that they were adhoc deposits. The same holds goods for refund.

7. He distinguished the case-law of AIR 57 Allahabad HC 799 on facts as there, the issue was one of duty on export. He distinguished the case of Indian Plywoods supra because in that case, there was no legal levy as no classification list had been approved and no assessments under RT-12 returns were done under item 68 and therefore the amounts were not treated as payments towards duty. In this case, Hon'ble Supreme Court has affirmed the classification which continued to

remain approved so and therefore on facts, the said judgment was distinguishable. Similarly, he distinguished other cases cited, particularly on advance income tax because in the present case the duty was collected, part by cash and part by bank guarantee and therefore these judgments which have reference to deposits have no application to the facts of this case.

8. With regard to question of time bar, Learned Senior Standing Counsel explained points of Section 11A *ibid* and submitted that it arose only either when duty had not been levied or paid or duty had been short levied or short paid. The section was not available in the present case because from 1977 onwards, appellants started paying and department started duty under 19(iii) and on 9.3.81 appellants requested to modify it to 19(0. The Hon'ble Andhra Pradesh High Court secured differential duty due as Bank Guarantee. Further, the classification list dt.

18.4.81 was approved under 19(iii) and RT-12 returns continued to be filed accordingly and assessed. Therefore, there was an imposition as well as assessment of duty under 19(iii). There was no short payment of duty either as duty was paid for 19(i) in cash and for 19(iii) by Bank Guarantee as per the High Court's order. Therefore, there was neither non-levy nor short levy. Under these circumstances, there was no need to issue a show cause notice under Section 11A. He further argued that Section 11A cannot be interpreted to mean an empty formality as has been done by the appellants. Therefore, once the classification is decided by the Hon'ble Supreme Court, payment of duty follows automatically and Section 11A has no application. He further asked even if it is held that there has been short levy, under 19(0, this has been as per legal order of the Hon'ble Andhra Pradesh High Court. He also argued that the order of Andhra Pradesh High Court does not merely order the stay of collection but issued positive directions to collect differential duty through Bank Guarantee. Therefore, there is no question of issuing any demand notice. He distinguishes the case of Gokak Patel Volkart Ltd., cited by Ld. Sr. Counsel for appellants on facts because there, the department sought change of classification whereas here it is challenged by the party and no redetermination is involved as the same entry under 19(iii) continues to hold good. He also cited the case of UOI v. Madhumilan Syntex Pvt. Ltd. .

9. With respect to principles of constructive res judicata, he argued that this issue of limitation was only introduced by appellants as additional ground at Collector (Appeals)' stage; that the tribunal did not consider this point in its majority order: that proceedings in the Supreme Court were in continuation of the proceedings which had taken place earlier and therefore this issue ought to have been raised before the Supreme Court by the appellants. On this count, he supported the order of Hon'ble Member (Judicial) from para 83 onwards above. He further argued that the question of constructive res judicata was not considered in detail in para 76 of the order recorded by Hon'ble Vice-President. He argued that demand was not set aside by any appellate authority. Therefore, the department did not seek confirmation thereof in the Supreme Court. The issue is now barred by actual res judicata.

10. On the conclusions of arguments by Ld. Senior Standing Counsel, Ld.

Senior Counsel for appellants raise to rebut. He argued that two basic points goes to the root of the matter as follows:-- (i) that out of this Rs. 7.21 Crores, only Rs. 5.25 Crores was deposited out of which Rs. 3.77 Crores was returned. This mean that Rs. 1.47 Crores were never paid at any time and at least for this, a demand under Section 11A was necessary; and (ii) under the Central Excise Law, levy and collection of duty involves following stages:-- The High Court order was in force from 3.4.81 to 18.3.87. During this period, no one could collect duty under 19 (iii). Therefore no amount paid or deposited in any form either in cash or by Bank Guarantee could be held to be towards payment of duty. That would have invited contempt of Court.

11. He further submitted that all the judgments cited by him earlier differ on facts but the principle is the same viz. collection without authority in law is not collection of duty but only a deposit.

Therefore, these judgments cannot be distinguished merely on facts.

12. The amounts deposited by the appellants subsequently as per the order of Hon'ble Andhra Pradesh High Court order were at the request of the Government, in national interest, under protest and therefore were not in any way related to

payment of Central Excise duty. To get it back no under Section 11B was necessary, and this is exactly what happened because the department returned part of the said amounts without their claiming any refund under Section 11B without proforma etc., prescribed therein. If it was payment towards duty, the Government would not have returned the said amounts without insisting to deal with the matter in terms of Section 11B.13. By its final decision on 4.5.97, Hon'ble Supreme Court classified the product under 19(iii). On that date, Rs. 7.21 Crores had not been paid towards differential duty. A sum of Rs. 5.77 Crores had been involved as adhoc amounts and therefore Section 11A squarely applies in case any duty is to be collected now.

14. Learned Sr. Counsel was at pains to distinguish that though the assessment was made under Andhra Pradesh High Court's order, there was always a short levy because if there was no short levy, Hon'ble High Court would not have ordered for Bank Guarantee. Hon'ble Court's order secured the differential amount without short-levy in the form of Bank guarantee. However, when a Bank Guarantee is submitted to Revenue, the Revenue does not get the amount appropriated and therefore a Bank Guarantee does not amount to payment of duty. It is merely confirmation of security for duty involved, if it ever becomes leviable.

15. He, therefore, stressed that the appellants had never abandoned their arguments that the payment of duty was never made right from the point they agitated it as an additional ground with the Collector (Appeals) and with the tribunal whether they get an order in their favour on classification. They did not go to the Supreme Court. It was the Revenue which knocked their doors. They were aware that the question of limitation had been agitated all along yet they just not to include it in the grounds of appeal before the Supreme Court. Regarding the argument that Section 11A is not an empty formality, Learned Sr.

Counsel rebutted by arguing that Section 11A is not merely concerned with determination of duty, it is also containing a statutory provisions of limitation. Therefore, it is not sufficient to say that appellants knew the amounts involved. Under these conditions, the Revenue has to demand the said amounts within the

prescribed time. Also an occasion for non-payment is immaterial. It can arise out of many reasons. For example. Revenue disputes, evasion, the party disputes, as High Court order. He also submitted that there is no question of suppression here as no such direction ordered by the Hon'ble Andhra Pradesh High Court to issue such a notice under Section 11A. Therefore, the issue of such notice is an essential condition before any amount could be demanded. He affirmed the case-laws of Gokak Patel Volkart Ltd. & Indian Plywoods supra.

16. He submitted that the minority order in para 17 of the Hon'ble Tribunal order cannot be brushed aside the way it has been done by his Learned Friend because in that Hon'ble Member was inclined to classify under 19(iii). Therefore, he had to decide clearly the issue of limitation also, as he did not get some opportunity of not deciding the issue of limitation as the majority decision got, and he does so in para 17 by holding that since there is no notice under Section 11A, therefore there is no issue of duty demand involved in this appeal.

17. Citing the case laws on Tin Plate Co. of India. as reported in 1997 (94) ELT 20 (SC), he argued that as laid down therein, demand is different from classification. Since the Revenue went in appeal to the Supreme Court and they got the question of demand outside the ambit of their grounds of appeal, therefore, clearly the Supreme Court could not have considered this question. Explaining this, he referred to grounds of appeal which involved "substantial question of law of general importance" and were all questions of classification only. The question of limitation as applied to this case would not be a general question of law. He further argued that list of dates, appended to the Revenue appeal before the Supreme Court as per the Apex Court Procedure does not list any documents of payment or the date on which additional grounds of limitation were filed by appellants before the Collector (Appeals). Further more, the order of the Hon'ble Supreme Court itself supports by addressing itself to the question of classification. From these facts, it is very clear that the Supreme Court only considered the question of classification.

18. In view of the aforesaid facts two tests of 'might' and 'ought' for constructive res judicata are to be satisfied. Since as already argued this has not been done

so, he prayed that appeal succeeds on both accounts i.e. on limitation and constructive res judicata.

19. I have carefully considered the arguments on both sides, the orders recorded above of Hon'ble Brother Vice-President and Hon'ble Brother Member Judicial (both since retired) and the records of the case.

20.1 Ld. Sr. Standing Counsel submits that the change in classification was sought by appellants, while the department all along classified goods under 19(iii). Factually, this is correct.

However, it is also factually correct that (a) appellants claim under 19(i) vide their letter dated 3.9.81, (b) that this claim is maintained all along in original adjudication, before Hon'ble Andhra Pradesh High Court, before Commissioner (Appeals), before CEGAT and finally before Hon'ble Supreme Court; and (c) that They filed classification list under protest to facilitate clearance of goods.

20.4 Ld. Sr. Standing Counsel submits that Order-in-Original orders that appellants shall pay duties under 19(iii) and question of refunds does not arise. Appellants do not dispute the contents but argue that these were beyond scope of SCN. 20.5 It is not disputed that Order-in-Appeal by both Commissioners do not consider issue of time-bar.

20.6 It is also not disputed that final order of Tribunal (as per majority) did not pass any opinion on time-bar, though issue was raised in appeal.

20.7 It is also not disputed that the issue of time-bar was not agitated in grounds of appeal before Hon'ble Supreme Court by Revenue, that it was neither raised in cross by appellants and that Hon'ble Supreme Court's order does not discuss or hold orders on time-bar.

20.8 It is also not disputed that certain sums were paid by appellants on request of Collector, against Bank Guarantees ordered by Hon'ble High Court of Andhra Pradesh and that these payments made were without prejudice to appellants rights under agitation and also under protest. However, nature of these payments are under dispute.

20.9 It is also not disputed that certain sums were returned to appellants by Department out of aforesaid payments made, but the nature of such sums returned are disputed.

20.10 It is also not disputed that all letters from department requiring appellants to pay were not notices under Section 11(A) but only follow-up letters arising out of quasi-judicial and judicial decisions.

21. Having summed-up the important undisputed facts, now proceed to consider the question of limitation.

(1) whether the original proceedings and those thereafter have legally demanded duty; (2) whether the Hon'ble Andhra Pradesh High Court's interim order stopped Revenue from issuing notices under Section 11A; (3) whether the Bank Guarantees submitted as per Hon'ble APHC's order tantamounts to collection of duties; (4) whether the amounts paid by appellants on Collector's request tantamounts in law as payment of excise duties; (5) whether the amounts returned to appellants by department are refund of excise duty; and (6) therefore whether the Revenue's demand for payment of duty, in the format it exists on record, is time-barred or otherwise.

21.1.1 While the appellants contend that at no stage, duty has been demanded legally, which can only be under Section 11A, Learned Senior Standing Counsel argues that duty is demanded legally because, (b) it is appellants who dispute it in 1981 and seek classification under 19(i) (c) that throughout the period, the Classification List approved under T.I. 19(iii) and RT-12s were assessed accordingly.

(d) the Order-in-Original clearly holds that duty is payable and question of refund does not arise, and that (e) therefore the question of payment of duty is linked with all subsequent or preceding proceedings.

21.1.1 I find that as there is no estoppel on either side in taxation matters, therefore merely because duties were paid under 19(iii) from 1977 does not take away the right of appellants to seek a change in 1981. I further find that because

the decision from Revenue was taking time, as represented by appellants, they had no other option but to file a classification list for 19(iii) under protest else their clearances and business was getting affected adversely. It is not in dispute that this was a clear and effective protest. Therefore, when the classification list was approved by Asstt. Commissioner under 19(iii), this was a decision forced upon the appellants who had lodged their protest. The simple meaning of such a protest is that the claim of appellants under 19(0) remained alive with all consequential benefits under law. The same position holds good for RT-12s assessed. I further find that the two show cause notices dated 5.4.87 and 6.4.87 only proposed the confirmation of the classification of the 'rexine' under 19(iii), but did not demand any duty, duly quantified, under Section 11(A). I find that in reply thereto, no issue of quantified duty payment was therefore covered. I further find that except for the concluding sentence of the Order-in-Original, nowhere is the issue of payment of duty/refund discussed on merits. It is an order on classification only. The concluding sentence does hold that duty should be paid and question of refund does not arise, but it does not record this order under Section 11(A). Appellants plead that this part of the said order is illegal, being beyond the scope of the notices. I agree with this plea because there is no demand for duty mentioned in the said notices and the adjudicating authority could not and cannot go beyond the notices in his order. Therefore, I find that upto the passing of Order-in-Original, there is no legal demand for duty raised under Section 11A. The Order-in-Appeal goes in appellants favour and hence question of upholding any demand for duty does not arise. The majority order of the Tribunal also does so and hence no duty demand is covered. Even the minority order, which held the goods classifiable under 19(iii). in para 17, clearly held, that there is no demand of duty on record and that it could be a separate issue to be raised later by Revenue. Though the minority order is not binding in law, the finding therein, supports my findings. I have carefully perused the grounds of appeal of Revenue before the Hon'ble Supreme Court. It starts by mentioning that a general question of law (on classification) is being agitated. Not one ground refers to either a demand for quantified duty vis-a-vis the respondent therein. Similarly, there is no mention of limitation. This still leaves the question of nature of payments made against Bank Guarantees unconsidered. It shall be considered later, as a Bank Guarantee

ordered by a Court of law, can by no stretch of imagination be a legal notice for demand of duty.

Therefore, in view of aforesaid discussions, I find that the first moot question raised at para 21.1. above is clearly answered in the negative.

21.1.2. The second question involves well settled law. In the case of Gokak Volkart , the facts narrated in para 2 are similar to this case. It was held in para 4 thereof that the Hon'ble Karnataka High Court had only stayed collection of duty and not stay of issue of notice of demand. Similarly, in the case of JK Cotton 99 ELT 8 SC supra, it was, in similar circumstances, held that nothing prevented the Commissioner issuing demand notices (para 22). I have also perused the interim order of the Hon'ble APHC. It very clearly stays collection of duty under 19(iii) and therefore orders Bank Guarantees covering differential amount of duty as security for Revenue. Therefore, in view of aforesaid case-laws, I find that the said order of Hon'ble Andhra Pradesh High Court did not in any way stay or bar the department from issuing notices of demand for duty under Section 11(A) or any other law.

21.1.3 The third question raised in para 21.1. above is perhaps one of the most fundamental to the whole issue. Learned Senior Standing Counsel has vehemently argued that the Bank Guarantees amounts represent only quantified sums of excise duty. Appellants contend that Bank Guarantees are mere deposits. They distinguish between such a deposit and duty collected as per law. I find that the one and only reason why the Hon'ble APHC ordered for submission of Bank Guarantees was to secure amounts equivalent to differential duty for Revenue because it had ordered Revenue not to collect the said duty. Therefore, it logically follows that the Bank Guarantees submitted are not payment of duties in law. For one, the Hon'ble APHC could not have given a mutually contradictory order viz., don't collect duty, yet collect duty in the form of Bank Guarantee. Further, in a Bank Guarantee, the Bank stands as a guarantor of specified sums and agrees to pay the same if specified conditions arise. Therefore, the amounts are lying with the Bank. They have not been appropriated to Government. The property vests with Bank and not with Government. Yes, the amounts are related to the amount of duty payable but the amounts are not duty paid/collected.

Therefore, it is clear that by submitting Bank Guarantees, the appellants have not paid and the Revenue not collected, duties of excise.

21.1.4 The fourth question raised in para 21.1 above is the most important one in this case. For if the monies paid and returned (on Collector's and appellants' request respectively) are payments of duty, then the question of limitation is to be viewed differently. Ld. Senior Standing Counsel contends that for the reasons already recorded earlier, the amounts paid were payments of duties of excise. Similarly, if the amounts returned were refunds, then, it would be a material finding to the issue. The case of the revenue is that:-- (a) the payments having been made against Bank Guarantees are nothing but duties because the said guarantees secured duties and now stood discharged; (b) all communication exchanged between Department and appellants use the words "duty" and "refund" and not "deposits"; (c) the amounts are quantified and not some lumpsum, and this quantification was known to appellants as being of excise duty because bank guarantees were submitted only on this basis; and (d) that as classification lists were approved and RT-12 were assessed, therefore these amounts represented duty payments, the levy having been involved already decided on the RT-12. In this connection it was argued that there was neither non-duty nor short-levy. Only differential duty was frozen in Bank Guarantees as per Hon'ble Andhra Pradesh High Court's order. Therefore, Section 11A was not at all involved. The case-law of Gokak Patel Volkart (supra) was distinguishable on facts and case of Madhumilan Syntex Pvt. Ltd. (supra) was cited in support. With due respect, I am unable to accept these for the following reasons:-- (i) as already discussed above, a Bank Guarantee secures duty, but does not necessarily pay duty. Now, the facts are that the Bank did not pay the amounts so secured to Revenue. The Banks merely accepted certain guarantees as discharged by Revenue, i.e. Banks liability to that extent stood acknowledged as cancelled, even-though not paid.

It was the appellants who deposited the specified sums. They did so on the request of Collector and his appeal to contribute towards national interest. The Bank had guaranteed payment of duties. The Bank never paid and was not required to do so. Instead the appellants paid. Therefore, it is clear that there is no nexus between the Bank Guarantee and the amounts paid by the appellants.

What I find is not that appellants paid cash and did not derive any benefit by getting the guarantees discharged. Obviously, the appellants did not have to pay guarantee service charges including interest to Bank once the guarantees were cancelled. But that does not create a nexus between payments made by appellants to Collector and the Bank Guarantees. Legally, the two are separate transactions; (ii) I agree that the amounts paid by the appellants were in proportion to duties secured in Bank Guarantees. But that concerned only the quantity aspect i.e., the quantity of monies paid were proportionate to certain duties secured by Bank Guarantees. Merely because the total quantities were in parallel, it does not follow that, ipso facto, the nature of payment was also same i.e. duties were paid.

[iii) Why were these monies paid? The answer to this question is very material to the issue and undisputedly, it is that they were paid in consideration of an appeal by the Collector who stressed national interest. The test here is: what would have happened if they had not paid? The answer is. the Bank Guarantees would continue to exist i.e., duty would remain secured. Instead duties, at the behest of the Collector and in the name of national interest, were secured by this arrangement in another manner-certain sums, earlier held by Banks, were now held by Government and the Bank Guarantees terminated. Only the sums representing security changed hands, but duty was not paid. This was so also because such payments were arranged to be made in a manner which was outside the scope of Central Excise Law covering levy and collection of duties viz.

Section 11(A). This was a civil contract between the Collector and the appellants. It is nobody's case that these sums were paid in compliance of any order issued under Rule 173I i.e. after assessment of duty leviable. That had only resulted in a Bank Guarantee. It is also nobody's case that the demand by Collector, even if national interest motivated it, was under Section 11A. No one applied his mind as per Section 11A(2). As against this, Ld. Sr. Standing Counsel submits that the correspondence exchanged between Revenue and appellants, including their undertaking, did mention that payments were in lieu of duty. Most humbly, I find that, in law, payments made in lieu of duty is not the same thing as payments made of duty.

(iv) When these payments were made, the interim order of the Hon'ble Andhra Pradesh High Court was in force. It had directed that differential duties cannot be collected. Thus, there was a command in law by a High Court of this land, that Revenue cannot collect duties and appellants cannot pay the same. Therefore, if amounts that were paid under protest, subject to final decision of writ lying in Andhra Pradesh High Court, but in national interest, on an appeal by the high office of Collector in Revenue, to demonstrate the appellants bonafides and devotion to national interest, were in fact duties of excise, then the Ld. Collector and the appellants, both knowingly and consciously committed contempt of court, though in national interest. This is an absurd proposition. One cannot interpret these noble actions to mean such ignoble consequences.

This is perversion of logic. Therefore, the harmonious construction is to be accepted as the correct one i.e., these amounts were paid as deposits towards duties secured by Bank Guarantees and were therefore mere deposits and not payment of duties. Therefore, no contempt of court was involved. It is not on record that either party had approached the Hon'ble APHC for modification of these orders so that duties could be paid and collected in National Interest. That would have been the legally correct course of action taken by both sides, if duties were involved. Merely because the words 'duty' or 'refund' are occurring, used loosely, such an absurd conclusion is not reached as argued by Revenue.

(v) It is well established law of the land, as submitted with citations galore, by Ld. Senior Counsel for appellants, that a deposit even against tax, is not the same thing as payment of that tax or duty. Ld. Senior Standing Counsel for Revenue bravely tries to distinguish on facts, But here facts such as duty on export, or advance income tax etc., are not material to the issue. What is material is whether such payments are deposits or payments of tax/duty and the principle enunciated and repeatedly laid down even by the Hon'ble Apex Court, is what matters and it is that unless any sums deposited are assessed and collected (appropriated) as duty under clear legal provisions, it remains a deposit. The same principle applies here. It is not relevant whether the quantum was proportionate or whether an equivalent amount, of Bank Guarantees were cancelled. What is relevant is whether the amounts were paid in compliance of a legal order of assessment of that much

duty. The Collector's letter was not such an assessment order. Nor did the Collector charge any interest when the amounts were paid in instalments at the convenience of the appellants. Collector may have power to grant instalment basis recovery but he has no power to exempt interest.

(vi) It is in the light of the findings at sub-para (v) above, that the fact that the sums paid were returned to appellants without their submitting a claim under Section 11(B) have to be appreciated.

It is well settled law that department has no powers to grant refunds of duties erroneously collected, suo moto. Yet it is not disputed that a substantial part, of these monies were returned to appellants without any recourse whatsoever to Section 11(B) by either side. No refund claim was lodged thereunder. None was considered and ordered thereunder. Did the Collector and the Assistant Collector contravene this law, merely to act in National Interest? I do not think any such high office would agree to do so.

That they did refund, as per their written contract with appellants, clearly shows that these sums were never regarded as payments of excise duties-merely deposits.

(vii) Learned Senior Advocate has cited the case of Madhumllan Syntex (supra). I have carefully considered the citation. The facts therein are that: (b) no opportunity given to assessees to have their say, and (c) no Order-in-Original was passed thereafter, though the issue concerned change in classification at behest of department. The only thing that is in common with facts in present case is that here too, appellants want change in classification. But all other facts are totally divergent. In the case under consideration, the respondent assessee was heard and a regular quasi-judicial Order-in-Original passed. Thus all principles of natural justice were duly observed and procedure established by law duly followed. The facts thereafter are also different. While in Madhumilan Syntex (supra), a regular show cause notice was issued under Section 11A for recovery of amounts short levied, in the case under consideration, no such notice under Section 11(A) was issued. Therefore, the citation stands distinguished on all basic facts.

21.1.5 The fifth question stands clearly answered in the negative by the findings above.

21.1.6. Therefore, I now come to consider the sixth and final question of para 21.1 above. In view of the findings above, I have already found that the amounts paid and refunded (in national interest etc.) were not payments/refund of duty (differential). It is an undisputed fact that duties have been collected legally under T.I. 19(i). It is also not disputed that no show cause notice has been issued under Section 11A(1) so far. They cannot also invoke the extended period, because right from 3.9.81 (letter of appellants proposing reclassification under 19(i), the department has been in the know of all facts and nothing stands suppressed. I cannot accept the argument of Ld. Senior Standing Counsel for Revenue, that there is neither non-levy or short-levy and therefore Section 11A itself is not applicable. This is because, as found in earlier sub-paras above, no duty has been paid on the difference between rates under 19(0 and 19(iii) so far. Therefore, there is clearly a short levy. Letters of demand on record, which even the Revenue concedes as not being a demand notice under Section 11(A), are not legal notices under law. At best they have only a persuasive or memo affect. Since there is no notice on record under Section 11(A) and even extended period therein cannot be invoked, therefore the whole issue of duty payment involved in this case is time barred, even if the demand letter of 1987 is considered to be a valid notice.

21.2 I have also carefully perused the order recorded by Hon'ble Vice-President on the aspect of limitation. Hon'ble Brother has gone in great details about the steps involved in levy and collection of duty.

He has also analysed the case-laws cited. There is no need to repeat these as I am in agreement with his analysis and views recorded.

I also find that Hon'ble Brother Member (Judicial) has not differed with Hon'ble Brother Vice-President's views on limitation alone. His difference of opinion lies on grounds of constructive Res Judicata i.e.

not with standing limitation, appellants are prevented by that principle.

22.0 The second point of difference referred to me is the applicability or otherwise of constructive res judicata. I have perused carefully the order recorded by Hon'ble Vice-President in this matter and I am in agreement with his views therein. As against this, I find that Hon'ble Brother Member (Judicial) has relied on the following citations:-- I have carefully considered these. The issue involved in does not concern constructive res judicata.

Similarly, is distinguishable both on facts as in head note (a) and because the issue involved is not constructive res judicata. Therefore, with great respect, I am unable to agree with Hon'ble Brother Member (Judicial) on these two precedents. With respect to . I find that the issue involved is of constructive res judicata and the test laid down therein is "incidental to or essentially connected to" the subject already ruled upon. Here, I find that since the Revenue in their appeal before Hon'ble Supreme Court did not agitate the issue of limitation under Section 11(A), therefore the order of Hon'ble Apex Court concerns with only the classification issue. Since Section 11A is independent of Rules 173B etc., therefore I cannot accept that the issue of limitation is "incidental or essentially connected to" the question of classification. The system of levy and collection of duty under Central Excise Act & Rules embraces a number of facts such as classification (Rule 173B), Valuation (Section 4 read with Rule 173C), payment of duty (Rules 173F & G), and assessment of duty (Rule 173I). If after all this is completed, there is a non-levy or a short-levy, then duty can be demanded under Section 11(A). Here too, first the authority who issues notice thereunder must consider the limitation aspect and then issue the notice. In such a vast and varied legal frame-work, it is difficult to hold that the limitation under Section 11A would be incidental etc. to Rule 173B. Therefore, reliance cannot be placed on this case-law also.

Ld. Senior Standing Counsel has argued that it was the responsibility of the appellants to have raised the issue of limitation before the Supreme Court. With great respect, I fail to appreciate this because-- (a) Revenue was aware that in lower forums the issue of limitation was raised but no decision was given; (c) Minority order in Tribunal had concluded that issue of limitation was a separate issue; and (d) therefore, when Revenue appealed to Hon'ble Supreme Court, it "ought" to have agitated this in their appeal. But they chose not to.

As against this, the present appellants were respondents before the apex court in that proceedings and they would only raise issues in cross which were agitated by the appellants (Revenue). Therefore, clearly the onus was on Revenue.

I have already held that the issue of limitation is different from the issue of classification. Because the former was not considered by Hon'ble Supreme Court, in whose order all the lower proceedings merge, therefore, I find that the principle of constructive res judicata does not apply to the facts of this case.

In view of the aforesaid findings, I concur with the order of Hon'ble Brother Vice-President and with great respect, am unable to agree with Hon'ble Brother Member (Judicial) and hold that the demands are barred by limitation and principles of constructive res judicata cannot apply in this case.

In view of orders recorded above, the majority decision holds that the demands involved are hit by limitation and the principles of constructive res judicata does not apply to the facts of this case. The appeal succeeds with consequential relief. Ordered accordingly.

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