# intercity Cable System (P) Ltd. Vs. Collector of C. Excise

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**SooperKanoon Citation** : sooperkanoon.com/8810

**Court** : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Oct-17-1995

**Reported in** : (1995)LC601Tri(Delhi)

**Appellant** : intercity Cable System (P) Ltd.

**Respondent** : Collector of C. Excise

**Advocate for Pet/Ap.** : Shri. V. Lakshmikumaran

**Judgement** :

1. This is an appeal against the order dated 28-2-1994 passed by the Collector of Central Excise, New Delhi.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of Electronic Push Button Dialer, Electronic Private Branch Exchanges and parts thereof. The Central Excise officers visited the appellants' factory on 12-8-1992 and carried out the verification. Thereafter, statement of the Managing Director of the appellant company and also the statement of Managing Director of M/s.

Shyam Antenna Electronics Pvt. Ltd. were recorded. After further investigation the appellants were served with a show cause notice dated 30-9-1992 alleging that during the period from 1-1-1987 to 20-8-1992 in terms of para 7 read with Explanation VIII to Notification No. 175/86, dated 1-3-1986 as amended by Notification No. 223/87, dated 22-9-1987 the exemption availed by them in respect of telephones and 'EPABX' instruments totally valued at Rs. 3,29,74,528/- under Notification No.175/86, dated 1-3-1986 (as amended) was not admissible since on the said goods they had used brand name "Shyam" which was owned by M/s.

Shyam Antenna Electronics Pvt. Ltd. The show cause notice further alleged that the appellants had suppressed the fact regarding the use of the brand name "Shyam" on their product, and therefore, they were liable to pay the differential duty of Rs. 36,44,264/- in terms of provisions to Section 11A(1) of the Central Excises and Salt Act, 1944.

By the said show cause notice the appellants were also asked to show cause as to why the seized excess stock comprising of 293 pieces of EPABX/ Telephones/ Amplifier valued at Rs. 3,31,400/- should not be confiscated and duty should not be recovered on shortage of 45 pieces of EPABX/ Telephone as against the recorded balance of 125 pieces in the RG-1 register. In their reply to the show cause notice and also during the personal hearing the appellants denied all the allegations in the show cause notice and mainly contended that even though they were using the brand name "Shyam" on their products namely EPABX systems and Push Button Dialers/Telephone sets, the exemption under Notification No. 175/86 (as amended) could be denied to them in terms of para 7 read with Explanation No. VIII of the said Notification since the brand name "Shyam" was registered since April, 1986 under the Trade and Merchandise Act by M/s. Intercity Cable Systems (P) Ltd. in respect of different products namely Satellite Antenna and other Antennae systems. However, by the impugned order the Collector held that notwithstanding the fact that this specified goods manufactured by the appellants and M/s. Shyam Antenna Electronics (P) Ltd. were different, the former was liable to be held as using the registered trade mark of the [latter] and accordingly the appellants were rendered ineligible for exemption in terms of para 7 of the Notification No. 175/86-C.E., dated 1-3-1986 (as amended). The Collector, therefore, confirmed the demand of Rs. 36,44,264/-. He also arrived at the finding that 45 pieces of EPABX/Telephones found short as compared to the recorded balance had to be deemed and having been removed without payment of duty in violation of provisions of Rules 9(1) and 52A read with Rule 173G of the Central Excise Rules, 1944 and confirmed the demand of duty amounting to Rs. 54,878/-

in respect of the said goods. As regards the seized goods collectively valued at Rs. 3,31,400/- he held that they were not liable for confiscation and dropped the charge in respect thereof.

3. On behalf of the appellants learned Sr. Counsel Shri Soli Sorabji submitted that the appellants are engaged in the manufacture of Push Button Electronic Telephone Dialers, Electronic Private Automatic Branch Exchanges and parts thereof. He added that in the impugned order the Collector has held that in terms of para 7 read with Explanation VIII of Notification No. 175/86-C.E. as amended by Notification No.223/87-C.E., the exemption under the said notification was not admissible on the appellants' products which were being affixed with the brand name or trade name "Shyam" belonging to another company namely, Shyam Antenna Electronic (P) Ltd. who were not eligible for exemption under the Notification No. 175/86. He contended that the brand name "Shyam" was registered under the Trade and Merchandise Act by M/s. Shyam Antenna Electronic (Pvt.) Ltd. in respect of 'Antenna Systems' which are entirely different from the product manufactured by the appellants. He contended that the trade mark "Shyam" not being the registered trade mark of M/s. Shyam Antenna Electronics (Pvt.) Ltd. or any other party in respect of Telephone and Tele-communication equipments, the provisions of para 7 read with the Explanation VII of Notification No. 175/86 (as amended) would not be attracted in respect of the said products manufactured by the appellants. He referred to the definition of trade mark and the provisions relating to the registration of the trade mark and infringement of trade mark under the Trade and Merchandise Act and contended that the language of para 7 read with Explanation VIII of Notification No. 175/86 as amended having been adopted from the relevant provisions under the Trade and Merchandise Marks Act, 1958 the use of the brand name "Shyam" in respect of Electronic Push Button, Telephone Dialers and EPABX would not come within the mischief of para 7 of Notification No. 175/86 since for such goods the brand name in question was not owned and registered by any other person. In support of his contention he placed reliance on the Tribunal's decision in the case of Precise Electronics v. Collector of C. Excise, reported in 1993 (65) E.L.T. 69 (Tribunal). Learned Sr.

Counsel further submitted that the demand confirmed by the Collector was time-barred since there could be no allegation of suppression, or mis-statement with the intent to evade duty on the part of the appellants. In this regard he referred to the document at page 166 of the paper book titled as 'statement of Shri S.S. Puri' and submitted that the statement was tendered before the visiting Central Excise team on 28-3-1987 and Shri Puri had clearly stated that the telephones were being manufactured by his company under the brand name "Shyam". He added that Central Excise Authorities were aware of the activities of the appellant company and the nature of their products including the fact that they were being manufactured under the brand name "Shyam" since their premises was investigated by the Central Excise authorities. Referring to the Collector's finding that failure on the part of the appellants to declare that they were using the brand name of another person in the classification list filed for the year 1987-1988, 1988-1989 and amounted to suppression of facts, he submitted that there was no stipulation in Rule 173B requiring an assessee to declare the brand name affixed to the goods. He stated that in any case the appellants had throughout acted on the bona fide belief that they were eligible for exemption under the Notification No. 175/86 (as amended), since the brand name "Shyam" was not owned/registered by any other person in respect of the products which the appellants were manufacturing. He contended that the appellants' claim that they had acted on the bona fide belief that they were eligible for the exemption under Notification No. 175/86 stands confirmed since the Board's letter No. 213/41/88-CX. 6, dated 30-12-1986 and the Tribunal's order in the case of Precise Electronics v. Collector (supra) supported the views of the appellants in regard to the interpretation of the said notification. He added that in the absence of any evidence of any intentional or deliberate withholding of information by the appellants the confirmation of the demand by the Collector by invoking the proviso to Section 11A is not sustainable.

4. On behalf of the respondent Shri A.K. Singhal, learned JDR submitted that on a plain reading of para 7 and Explanation VIII of Notification No. 175/86 (as amended) it follows that the exemption under the notification was not admissible in a case where specified goods manufactured by an asses-see were affixed with the brand or trade name whether registered or not of another person who was not eligible for the grant of exemption under the notification. He added that there was

no stipulation in the notification that the exception in para 7 was applicable only in a situation where the brand name or trade name affixed by the manufacturer to his goods was the brand name or trade name owned and registered by any other person in respect of identical goods. He contended that under these circumstances there was no force in the appellants' contention that the exemption under the Notification No. 175/86 (as amended) was admissible to them in respect of EPABX and other telephone/communication equipments manufactured by them since the brand name in question was owned and registered by M/s. Shyam Antenna Electronics Pvt. Ltd. in respect of different products namely antenna systems. As regards the contention of the appellants that the order passed by the Collector confirming the demand by invoking the extended period was not sustainable, he submitted that there was no force in the appellants' submission since they had deliberately suppressed the information regarding use of the brand name or trade mark owned by another person on their goods in the classification lists filed after the amendment of Notification No. 175/86.

5. We have examined the records of the case and considered the submissions made on behalf of both sides. It is seen that the main points that arise for consideration in this case are the following :- (a) Whether the finding in the impugned order that the appellants having affixed on their telephone and EPABX system the brand name "Shyam" which was owned and registered under the Trade and Merchandise Marks Act, 1958 by M/s. Shyam Antenna Electronics (P) Ltd. in respect of communication equipment namely Dish Antenna, Computer etc. had rendered themselves ineligible for the benefit of the exemption in terms of Notification 175/86-C.E., dated 1-3-1986 as amended by Notification 223/87.

(b) Whether the demand confirmed by the Collector in the impugned order by invoking the extended period under the provisions to Section 11-A of the Central Excises & Salt Act, 1944 is sustainable.

6. For the proper appreciation of the rival contentions we refer to para 7 and Explanation VIII of Notification No. 175/86 (as amended) :- "7. The exemption contained in this notification shall not apply to the specified goods where a manufacturer affixes the specified goods with a brand name or trade name

(registered or not) of another person who is not eligible for the grant of exemption under this notification : Provided that nothing contained in this paragraph shall be applicable in respect of the specified goods cleared for home consumption before the 1st day of October, 1987." 'Explanation VIII. - "Brand name" or "trade name" shall mean a brand name or trade name, whether registered or not, that is to say a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without indication of the identity of that person.' 7. It is seen from the impugned order that the Collector had arrived at a finding that the appellants were not eligible for exemption under Notification No. 175/86-C.E., dated 1-3-1986 as amended by Notification No. 223/87-C.E., dated 22-9-1987 in respect of EPABX and telephone equipments since they were affixing to these products the brand/trade name "Shyam" belonging to M/s. Shyam Antenna Electronics (Pvt.) Ltd. The Collector has justified his finding on the grounds that in terms of para 7 of the said notification the exemption contained therein was not applicable to the goods which were affixed with the brand name or trade name (whether registered or not) in a manner so as to indicate a connection in the course of trade between the specified goods in question and some other person using such name or mark.

8. The appellants' case is that the Collector's finding is erroneous since the definition of the brand name or trade name in Explanation VIII to Notification No. 175/86 as amended is similar to the definition of trade mark in Section (sic) of Trade & Merchandise Marks Act. 1958 under which the registration of a trade mark need not be necessarily in respect of all goods and unless it is so acquired and it is permissible to have the same trade mark/brand name for different classes of goods owned by different persons. It has, therefore, been contended that the exemption under the Notification No. 175/86 as amended cannot be denied to them on the basis of provisions of para 7 of the said notification since they were using the brand name "Shyam" on their products namely, telephone and EPABX equipment whereas the trade name "Shyam" was owned and registered by M/s. Shyam Antenna Electronics Pvt. Ltd. in respect of entirely different products viz, Antenna equipment. In support of their contention they have relied upon the

Tribunal's decision in the case of Precise Electronics v. Collector, reported in 1993 (65) E.L.T.69 (Tribunal). The relevant extract from which are reproduced below :-

5. The first question that arises for consideration is whether the use of another's brand name by itself alone, when the other manufacturer is not eligible for the benefit of the Notification simpliciter would disentitle the manufacturer from the benefit of the notification. Now it has so happened that the brand name may be used by a number of persons for different products and the said brand name may or may not be registered and the manufacturer claiming the benefit of the notification may or may not be aware of the use of the said brand name and there may or may not be a claim to the legal ownership of the brand name. If the mere use of the brand name belonging to another person would disentitle the manufacturer from the benefit of the exemption notification it would spell disaster on many unwitting users of the brand name which may also be used by another person for his products. Such an interpretation which will hit the users of the brand name and who have used the same without the conscious knowledge that another person at the relevant time was also using the said brand name, has to be avoided. Para 7 of the notification was obviously introduced to take care of the mischief where a manufacturer of a particular brand of goods to avoid payment of duty in respect of the goods he would like to place in the market with his brand name parcels out the production to small scale units or even may set up such units by keeping front men. In this background, therefore, the words used in paragraph 7 of the notification i.e. brand name' or 'trade name' of 'another person' have to be read in a manner that will while advancing the purpose for which the para was introduced would not hit the people who are genuine small scale manufacturers and are using a brand name without any knowledge that another person is also using the same brand name. The 'brand name' of 'another person' has to be understood to mean that a particular brand name is such as it belongs to the 'other person' and the right of ownership to that can be established by record notwithstanding the fact that the brand name is registered or not and that the said brand name by right belongs to the other person for use on the goods of the type manufactured by the manufacturer claiming the benefit of the exemption notification. It does not matter whether the other person who has a right to the particular brand name or trade mark himself manufactures any specified goods or

not. The plea made by the appellants that unless it can be shown that the brand name of the other persons is for specified goods the mischief of para 7 cannot be attracted as seen from the wording of para 7 read with Explanation VIII of the notification under which the terms 'brand name' or 'trade name' have been defined. The learned Consultant for the appellant has cited the instructions of the Board in regard to the brand name wherein the Board has clarified that use of a particular brand name registered for one product of another person does not attach any disability for the purpose of the notification in case the same is used for another product. This goes to show that the intention in para 7 is to actually disentitle such of the manufacturers who use the brand name of other persons to which the other persons have a right for use on the product manufactured by the manufacturer claiming the benefit of the notification. In the present case, we find the appellants have been found to be using the brand name of another person who is using it on watches. The lower authority has not examined whether the other persons namely M/s.

Doshi Electronics who use the brand name 'master piece' on the watches hold the legal right for using the same on other categories of watches and clocks. Unless it can be shown that the brand name 'master piece' belongs to M/s. Doshi Electronics for use on the wall clocks also, the appellants cannot be held to be within the mischief of para 7. Further we find that there is no finding whether Doshi Electronics themselves are ineligible for the benefit of the notification. The criteria regarding the eligibility of the brand name to the benefit of the notification is also required to be established before the provision for availing of the benefit of the concession under para 7 can be invoked. In regard to both the parameters as described above, there are no findings of the lower authority. In view of what we have discussed above, the lower authority's order is not maintainable and we, therefore, set aside the same and remand the matter to the lower authority for de novo adjudication, in the light of our observations after giving the appellants an opportunity of hearing." 9. We find that on this issue the Madras High Court has taken a contrary view in the case of Bell Products Co. v. U.O.I, reported in 1995 (78) E.L.T. 404. In the case before the High Court three firms constituted by different members of the same family as partners were using the brand name "BELL" with or without emblem of another person viz. A Chilladurai one of the partners of the Bell Products Co. The High Court held that with the amendment introduced to Notification No.175/86-C.E. by Notification No. 1/93 and subsequent amendment thereto, eligibility to claim exemption had been made dependent upon the aggregate value of clearances and in order to ensure there was no abuse by the manufacturers who were otherwise not eligible to claim such exemption enjoying the same by creating different unit, provision for denying the exemption was introduced when the product of a unit or a manufacturer of such product uses a common brand name or trade name or mark of another whether registered or not. The High Court further held that for the purposes of excise duty and application of rates it is the totality of clearances that have to be taken into account and not the clearances in respect of different products when exemption is sought to be claimed under the notification in question, since the notification apart from stipulating mere user of the brand or trade name of another person, does not carry any further limitation on such user that it should be in respect of similar or identical goods also and the various explanation to para 4 of the notification would go to show that total value of clearances has to be taken into account in adjudicating upon the eligibility or otherwise the claim for exemption. Paras 11 and 12 of the said judgment being relevant are reproduced below :- "11. The fact that the three units which have filed the above Writ Petitions are located at BELL Industrial Complex at Tirunelveli and though different members constituted the three firms as partners not only they are all members belonging to the same family, but more than one of such members of the family members holds interest in all these three firms are not in serious contravinity. As a matter of fact, in using the common brand name, sometimes it is used with by inscribing the letters and sometimes with the mark of the 'BELL'.

This variation in the pattern of using the brand name would not in any manner, alter the position that the units have been using the trade or brand name of another person, viz. Mr. A. Chelladurai, one of the partners of the BELL Products Company. Brand name or trade name may be of a name or mark used either as a symbol or monogram or mere writing. Though the individual units of the BELL group as such are being managed by different members of the family to create in the eye of law a separate legal identity, the fact that in the market, these products are pushed through as 'BELL' products as claimed by the department cannot be said to be incorrect or rejected as of no significance or relevance. Though the exemption of the nature in question has been initially envisaged for being granted on the basis of a particular unit constituting a small scale industrial unit as recognised by the Director of Industries and Commerce with the passage of time and with experience gained in its implementation, by periodical amendments, the basis of the grant had undergone a conspicuous change and with the amendments introduced by Notification 1 /93 and the subsequent amendments thereto, the eligibility to claim exemption or concessional rates of duty has been made to depend upon the basis of aggregate value of clearance and in order to ensure that there is no abuse by the manufacturer who is otherwise not eligible to claim such exemption enjoying the same by creating or floating different units or by fragmentation of a single unit, the provision for denying the exemption was introduced when the product of a unit or a manufacturer of such product uses a common brand name or for that matter the brand or trade name or mark of another whether registered or not.

12. While that be the position, can the petitioners be held to be entitled to the exemption merely because the products of the units are different notwithstanding the common or identical brand name used for the products. For the purposes of excise duty and application of the rates, it is the totality of the clearances that have to be taken into account and not the clearances in respect of different products when exemption is sought to be claimed under the notifications in question. The notification, apart from stipulating the mere user of the brand or trade name of another person, does not carry any further limitation on the said user that It should be in respect of similar or identical goods also. The various explanations to paragraph 4 of the Notification in question would go to show that the total value of clearance have to be taken into account in adjudicating upon the eligibility or otherwise of the claim for exemption. In view of the above, I am of the view that the claims of the petitioners have to fail and consequently these writ petitions shall stand dismissed. No costs." Since no contrary judgment of any other High Court has been brought to our notice we follow the judgment of the Madras High Court extracted above and hold that even if the appellants were using the trade mark or brand name "Shyam" which was owned and registered by M/s. Shyam Antenna (P) Ltd. in respect of products which were different from the appellants own

products the benefit of the exemption under Notification No. 175/86 was not admissible to the appellants since they were using on their products the brand name of Shyam Antenna Electronics (P) Ltd. who were not eligible for the exemption under the said notification.

9A. The second point to be examined is whether the order passed by the Collector confirming the demand by invoking the extended period under the proviso to Section 11-A on the ground of suppression of fact is sustainable. In this regard the appellants' case is that the department was throughout aware that the appellants were using the brand name "Shyam" on their Electronic Telephone and EPABX equipment and they were working in close collaboration with M/s. Shyam Communication System. In this regard reliance has been placed on the document at page 166 of the case records titled "Statement of Shri S.S. Purl" which bears the date 28-3-1987. According to the appellants the contents of the statement confirmed that the information incorporated therein was furnished to the Suptd. Central Excise under Section 14 of the Central Excises & Salt Act, 1944 when he had carried out investigation in their premises.

They have contended that the department had full knowledge about the nature of their product and the brand name under which they were being marketed. As regards the Collector's finding that the failure on the part of the appellants to declare in the classification lists filed for the years 1987-88,1988-89 and 1989-90 that they were using on their products the brand name "Shyam" belonging to another person amounted to suppression of facts, the appellants have contended that there is no stipulation in Rule 173B on the basis of which it could be alleged that the appellants were bound to declare in the classification list the brand name affixed to the goods. The appellants have also contended that there could not be any finding of deliberate suppression of fact with intent to evade duty since they had acted on the bona fide belief that in respect of the goods in question they were eligible for the exemption under Notification 175/86 (as amended). In this regard they have stated that their views regarding the interpretation of the provisions relating to brand name or trade mark in the said notification have been confirmed by the Board vide their letter No.213/41 /88-CX, dated 30-12-1988 and also by the Tribunal by its order in the case of Precise Electronics v. Collector 10. From the impugned order we find that the appellants' claim that the use of the brand name "Shyam" on their product was within the knowledge of the excise authorities was rejected by the Collector on the grounds that it is not clear from the statements dated 28-3-1987 and 14-8-1987 that they were actually recorded by the Central Excise officers during their visits to the appellants' factory. He has observed that even if these statements were admitted they would not constitute a declaration by the appellants to the department. In this regard the Collector has also observed that even otherwise these statements were given prior to the issue of the amending Notification No. 233/87, dated 22-9-1987 which came in force w.e.f. 1-10-1987 and accordingly even if it could be said that in March, 1987 that the appellants had informed the officers visiting their factory that they were using a particular brand name on their products that would not lead to the conclusion that the brand name in question continued to be used long thereafter so as to put the departmental officer automatically on notice. The Collector has observed that this has to be weighed in the light of the fact that in the classification lists filed by the appellants claiming exemption under Notification No. 175/86 for the years 1987-88,1988-89 and [1989-90] they had suppressed the fact of using the brand name/trade name "Shyam" belonging to another person as they had not made any such declaration in the body of the classification lists and in the classification lists filed for the years 1990-91,1991-92 and 1992-93 they made a false declaration that "we are not manufacturing specified goods with a brand name or trade name registered or not of another person who is not eligible for the grant of exemption under Notification No. 175/86, dated 1-3-1986 as amended." The Collector has, therefore, held that the statements dated 28-3-1987 and 14-8-1987 could not be of any help to the appellants since they were given much before 1-10-1987 when the Notification No. 175/86 was amended so as to make small manufacturers who use the brand name or trade name ineligible for exemption under the notification.

11. The learned counsel for the appellants has contended that the Collector's order invoking the extended period under proviso to Section 11A for confirmation of the demand based on his finding regarding suppression of facts is not sustainable since there is no requirement under Rule 173B that a manufacturer should declare the brand name of his products. In this regard the appellants have also contended that they had acted on the bona fide belief that the amendment to

Notification No. 175/86 by Notification No. 223/87 could not have the effect of denying to them the exemption under the said notification since the brand/trade name "Shyam" used by them on their products was not owned or registered by any other person in respect of goods manufactured by them and their views in regard to the interpretation of the amended notification finds confirmation by the clarification issued by the Board in their letter dated 30-12-1988 and also by the Tribunal's decision in the case of Precise Electronics v. Collector (supra).

12. We find that there is sufficient force in the appellants' contention that in terms of Rule 173B no responsibility was cast on them to declare the trade name or brand name affixed by them on their goods. Having regard to the clarification issued by the Board in their letter S/213/41/88-CX, dated 30-12-1988 and the Tribunal's decision in the case of Precise Electronics v. Collector (supra) we are inclined to hold that there is sufficient force in the contention of the learned counsel for the appellants that they had acted on the bona fide belief that they were eligible for the exemption under Notification No. 175/86 as amended Notification No. 223/87 in respect of their Electronic Telephone equipment and EPABX Exchange since the brand/trade name "Shyam" was not owned or registered by any other person in respect of identical goods namely Telephone/Tele-communication equipment. In the case of Collector v. Champhor Drugs and Liniments, reported in 1989 (40) E.L.T. 276, the Apex Court has held that the extended period of 5 years is applicable when something positive other than mere inaction or failure on the part of the manufacturer is proved and conscious or deliberate withholding information by the manufacturer is necessary to invoke larger period of limitation of 5 years. Like wise in the case of Padmini Products v. Collector, reported in 1989 (43) E.L.T. 195 (S.C.) the Hon'ble Supreme Court has held that mere failure or negligence on the part of the manufacturer either not to take out licence or not to pay duty in case there is a scope for doubt does not attract extended limitation. For invoking the extended period of limitation of 5 years duty should not have been paid, short levied or short paid or erroneously refunded because of any fraud collusion or wilful mis-statement or suppression of fact or contravention of any provision or rule therein. These ingredients postulate a positive act, therefore, failure to pay duty or take out a licence is not necessarily due to fraud or collusion or wilful mis-statement or

suppression of fact or contravention of any provision of the Act and likewise suppression of facts is not failure to disclose the legal consequences of a certain provision. Para 8 of the said judgment being relevant is reproduced below :- 8. Shri V. Lakshmikumaran, learned Counsel for the appellant drew our attention to the observations of this Court in Collector of Central Excise, Hyderabad v. Chemphar Drugs and liniments, Hyderabad - 1989 (2) SCC 127 where at page 131 of the report, this Court observed that in order to sustain an order of the Tribunal beyond a period of six months and upto a period of 5 years in view of the proviso to Sub-section (1) of Section 11A of the Act, it had to be established that the duty of excise had not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. It was observed by this Court that something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability beyond the period of six months had to be established. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful mis-statement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal, however, had held contrary to the contention of the appellants. The Tribunal noted that dhoop sticks are different products from agarbaties even though they belonged to the same category and the Tribunal was of the view that these were to be treated differently. Therefore, the clarification given in the context of the agarbaties could not be applicable to dhoop sticks etc., and the Tribunal came to the conclusion that inasmuch as the appellant had manufactured the goods without informing the Central Excise authorities and had been removing these without payment of duty, these would have to be taken to attract the mischief of the provisions of Rule 9(2) and the longer period of limitation was available. But the Tribunal reduced the penalty. Counsel for the appellants contended before us that in view of the trade notices which were referred to by the Tribunal, there is scope for believing that agarbaties were entitled to exemption and if that is so, then there is enough scope for believing that there was no need of taking out a licence under Rule 174 of the said Rules and also that there was no need of paying duty at the rime of removal of dhoop sticks, etc. Counsel further submitted that in any event apart from the fact that no licence had been taken and for which no licence was required because the whole duty was exempt in view of Notification No. 111/78, referred to here in before, and in view of the fact that there was scope for believing that it was exempt under Schedule annexed to the first notification, i.e., 55/75, being handicrafts, the appellants could not be held to be guilty of the fact that excise duty had not been paid or short-levied or short-paid or erroneously refunded because of either any fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder. These ingredients postulate a positive act.

Failure to pay duty or take out a licence is not necessarily due to fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act. Suppression of facts is not failure to disclose the legal consequences of a certain provision. Shri Ganguly, appearing for the revenue, contended before us that the appellants should have taken out a licence under Rule 174 of the said Rules because all the goods were not handicrafts and as such were not exempted under Notification No. 55/75 and therefore, the appellants were obliged to take out a licence. The failure to take out the licence and thereafter to take the goods out of the factory gate without payment of duty was itself sufficient, according to Shri Ganguly, to infer that the appellants came within the mischief of Section 11A of the Act. We are unable to accept this position canvassed on behalf of the revenue. As mentioned here in before, mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was scope for doubt as to whether licence was required to be taken out or where there was scope for doubt whether goods were dutiable or not, would not attract Section 11A of the Act. In the facts and circumstances of this case, there were materials, as indicated to suggest that there was scope for confusion and the appellants believing that the goods came within the purview of the concept of handicrafts and as such were exempt. If there was scope for such a belief or opinion, then failure either to take out a licence or to pay duty on that belief, when there was no contrary evidence that the producer or the manufacturer knew that these were excisable or required to be licensed, would not attract the penal provisions of

Section 11A of the Act. If the facts are otherwise, then the position would be different. It is true that the Tribunal has come to a conclusion that there was failure in terms of Section 11A of the Act. Section 35L of the Act, inter alia, provides that an appeal shall lie to this Court from any order passed by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment. Therefore, in this appeal, we have to examine the correctness of the decision of the Tribunal. For the reasons indicated above, the Tribunal was in error in applying the provisions of Section 11A of the Act. There were no materials from which it could be inferred or established that the duty of excise had not been levied or paid or short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of the Rules made thereunder.

The Tribunal in the appellate order has, however, reduced the penalty to Rs. 5000/- and had also upheld the order of the confiscation of the goods. In view of the fact that the claim of the revenue is not sustainable beyond a period of six months on the ground that these dhoop sticks, etc. were not handicrafts entitled to exemption, we set aside the order of the Tribunal and remand the matter to the Tribunal to modify the demand by confining it to the period of six months prior to issue of show cause notice and pass consequential orders in the appeal on the question of penalty and confiscation. The appeal is allowed to the extent indicated above and the matter is, therefore, remanded to the Tribunal with the aforesaid directions. This appeal is disposed of accordingly." 13. In view of the above discussion we are of the view that in the facts and circumstances of the case the charge of suppression of fact with intent to evade duty is not sustainable. We, therefore, hold that the impugned order confirming the demand for the period beyond six months under the proviso to Section 11A is not sustainable and the differential duty, if any, would be recoverable only in respect of the clearances during the normal period of limitation of 6 months from the date of the show cause notice.

14. As regards the penalty of Rs. 5 lakhs imposed on the appellants we find that the goods valued at Rs. 3,31,400/- seized from the appellants' premises on 12-8-

1992 and 20-8-1992 were held by the Collector as non-offending goods. In regard to the goods valued at Rs. 2,38,600/- found short on stock taking on 12-8-1992 he held that they were removed without payment of duty in violation of provisions of Rules 9(1), 52A read with 173G of the Central Excise Rules, 1944 and the demand of duty amounting to Rs. 54,878/- on these goods was confirmed. In view of our finding that the charge of suppression of facts with intent to evade duty was not sustainable and taking into account the fact that the goods seized were found as non-offending and were released, we reduce the penalty imposed on the appellants to Rs. 25,000/-.