

Commissioner of Central Excise Vs. G.T.C. Industries Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-25-1996

Reported in : (1996)(86)ELT431TriDel

Appellant : Commissioner of Central Excise

Respondent : G.T.C. Industries Ltd.

Judgement :

1. M/s. G.T.C. Industries Ltd. (for short, the assessee) manufactures cigarettes in its factories at Bombay, Baroda, Hyderabad and Jammu. The dispute in these appeals relates to the assessable value of and excise duty payable on cigarettes cleared from these factories during the period 1-7-1978 and 30-6-1980 and from the factories at Bombay and Baroda during the period 1978-1979 to 1982-1983. Duty was ad valorem during the entire period. The goods were being cleared (there is a dispute if provisionally or otherwise) on payment of duty. The dispute in these appeals relates to short levy demand made under three show cause notices and the common final order passed thereon.

2. The particulars of three notices and the confirmation thereof are as follows:----- I Show cause notice II S.C.N. III S.C.N.-----Date 26-8-1983
19-4-1984 2-9-1985-----Period
1978-79 to 1982-83 1978-79 to 1982-83 1-7-1978 to 30-11-1980
covered-----Factory GTC
Bombay GTC Baroda GTC Bombay and covered Baroda Universal Tobacco

Hyderabad,-----Amount of Rs. 28.93
crores Rs. 35.32 crores Rs. 13.37
croresdemand-----Final order The
principles on the basis of which differential dutyDifferent has to be worked out are
laid down and differential dutyial duty directed to be worked out accordingly by
representatives of Bombay and Baroda
Collectorates.-----Final order
confiscat- - - -ion-----Final order
Composite penalty of Rs. 10 crores imposed only on GTCpenalty factories at
Bombay and Baroda. No penalty on the other two
factories.-----Final order - - Claim in
the showlimitation cause notice held to be barred by time.

The final order in regard to I and II show cause notices is challenged by the assessee under Section 35B(1) of Central Excises and Salt Act, 1944 (for short the Act) and the final order in regard to III show cause notice is challenged by the department under Section 35E(4) of the Act pursuant to the order of the Board under Section 35E(1) of the Act. All the appeals have been heard together and are being disposed of by this common order.

3. This is filed by the Commissioner (L & A) and is being treated as an appeal under Section 35E(4) of the Act. Learned counsel for the assessee has raised a preliminary objection that the appeal is barred by time. The Board, under Section 35(1) was satisfied that the impugned order to the extent it held the III show cause notice to be barred by time even applying the enlarged period of limitation under the proviso to Section 11A of the Act is not legal or proper and directed Commissioner (L & A) to apply to the Tribunal for the determination of the aforesaid point. Sub-section (3) of Section 35E requires that no order shall be passed under Section 35E(1) after the expiry of one year from the date of the order impugned. Sub-section (4) of Section 35E requires that such application to the Tribunal shall be made within a period of three months from the date of communication of the order under Sub-section (1) of Section 35E to the adjudicating authority and that such application shall be heard by the Tribunal as if it is an appeal made against the impugned order and the provisions of the Act

regarding appeals, so far as may be, apply to such application. The preliminary objection of the assessee to the maintainability of Appeal E/1846/94A is three-fold : (a) The order of the Board under Section 35(1) of the Act was long after the lapse of period of 1 year from the date of the impugned order and hence invalid and ineffective and as such the appeal or application filed by the Commissioner (L&A) under Section 35E(4) is ineffective and barred by time.

(b) The application or appeal under Section 35E(4) was filed by the Commissioner (L & A) more than 3 months after the communication to him of the order of the Board under Section 35(1) and hence is barred by time.

(c) The application or appeal was filed after the lapse of time allowed by the High Court of Bombay and as such is barred.

4. Ground (a) : The impugned order passed by the Director (L&A) bears the date 21-8-1987. The date on which it was communicated to the assessee is not known. The I and II show cause notices were challenged by the assessee before the High Court of Bombay in W.P. No. 67/1984.

The High Court passed several interim orders at various stages. The High Court permitted the adjudication proceedings to continue but directed that after the adjudicating authority signs the adjudication order, it shall be kept in a sealed envelope and shall not be communicated to the assessee and no official shall inform the assessee of the fact that the order has been passed or signed. Subsequently, the writ petition was amended to challenge the III show cause notice. On 18-6-1991, the High Court directed that the sealed envelope in which the impugned order was placed be opened and the order be shown to the counsel for the parties, that copy of the order be supplied to the assessee's counsel. Sealed envelope was opened on 18-6-1991.

Subsequently, the writ petition was amended challenging the impugned order also. On 21-7-1994, the High Court directed that the assessee and the department file appeals against the order before the Tribunal within three months from that day and the Tribunal will entertain the appeals without regard to the period of limitation for filing appeal.

The Board passed the order under Section 35E(1) of the Act on 29-5-1992 directing the Commissioner (L & A) to apply to the Tribunal for determination of the two points formulated in its order. The points have been raised in the departmental appeal which is now challenged as barred by time.

5. Section 35E(3) mandates that no order under Section 35E(1) of the Act shall be passed after the expiry of period of one year from the date of the impugned order. The impugned order was signed and passed on 21-8-1987. The Board's order was passed on 29-5-1992, more than four years and nine months after the date of the impugned order. Prima facie, the Board was not competent to pass the order on that date. Shri Bajpai for the department contended that since the impugned order was, immediately on its passing kept in a sealed envelope as per order of High Court of Bombay and the sealed envelope was opened as per court order only on 18-6-1991, it could not have been communicated to the Board on any day before 18-6-1991 and to regard the date of the order as the date from which time began to run would mean that Board's jurisdiction and competency to pass an order under Section 35E(1) of the Act ended before such jurisdiction could commence and the Board could not invoke its jurisdiction with respect to an undisclosed order kept in a sealed envelope. Board's order having been passed within one year after the date on which the impugned order was taken out of the sealed envelope it must be treated as having been passed within the statutory period. Shri Khaitan for the assessee, relying on the decision of the Supreme Court in Collector of Central Excise v. MM.Rubber Co. -1991 (55) E.L.T. 289 rebutted the contentions of the department. Shri Bajpai placed reliance on the decisions in Raja Harish Chandra Raj Singh v. The Deputy Land Acquisition Officer and Anr. -1962 (1) SCR 676, Assistant Transport Commissioner (Administration) U.P. v. Sri Nand Singh - 1981 (1) SCR 131 and Shanti Pershad and Anr. v. Competent Authority under the Shim Areas and Ors. - AIR 1965 Punjab 6. The starting point of limitation for the purpose of filing an appeal under Section 35B(3) of the Act is "the date on which the order sought to be appealed against is communicated to the Collector of Central Excise, or, as the case may be, the other party preferring the appeal." The starting point of limitation for applying to the Tribunal under Section 35E(4) of the Act is from the date of communication of the order." Similar is the language used in Section 35(1) of the Act in case of appeal to the Collector (Appeals). However,

the language used in Section 35E(3) is different. It says that "No order shall be made under Sub-section (1) or Sub-section (2) after the expiry of one year from the date of the decision or order of the adjudicating authority." The Supreme Court had occasion to deal with this provision in *Collector of Central Excise v. MM. Rubber Co.* - 1991 (55) E.L.T. 289. In that case the order of the Collector was to passed on 28-11-1984. A copy of the order was despatched to and received by the assessee on 21-12-1984.

The Board on 11-12-1985 directed the Collector under Section 35E(1) to apply to the Tribunal for correct determination of points arising and accordingly an application was filed under Section 35(4) of the Act.

The Tribunal held that the relevant date of the adjudication order for the purpose of Section 35E(3) should be taken to be 28-11-1984 and not 21-12-1984 and, therefore, the order of the Board should be held as having been passed beyond the period of one year stipulated and, therefore, the application before the Tribunal under Section 35E(4) of the Act was incompetent. The Supreme Court upheld the decision of the Tribunal after referring to several decisions including the decision in *Raja Harish Chandra Raj Singh v. The Deputy Land Acquisition Officer and Anr.* Asstt. Transport Commissioner (Administration) U.K.P. v. *Sri Nand Singh* - 1981 (1) SCR 131 and agreeing with the decisions in *Muthia Chettiar v. CIT* - ILR1951 Madras 815 and *Viswanathan Chettiar v. CIT* - 25 ITR 79. The Supreme Court held as follows: "It may be seen, therefore, that, if an authority is authorised to exercise a power or do an act affecting the rights of parties, he shall exercise that power within the period of limitation prescribed therefor. The order or decision of such authority comes into force or becomes operative or becomes an effective order or decision on and from the date when it is signed by him. The date of such order or decision is the date on which the order or decision was passed or made : that is to say when he ceases to have any authority to tear it off and draft a different order and when he ceases to have any locus penitentiae. Normally that happens when the order or decision is made public or notified in some form or when it can be said to have left his hand. The date of communication of the order to the party whose rights are affected is not the relevant date for purposes of determining whether the power has been exercised within the prescribed time."

"Thus if the intention or design of the statutory provision was to protect the interest of the person adversely affected, by providing a remedy against the order or decision any period of limitation prescribed with reference to invoking such remedy shall be read as commencing from the date of communication of the order. But if it is a limitation for a competent authority to make an order the date of exercise of that power and in the case of exercise of suo motu power over the subordinate authorities' orders, the date on which such power was exercised by making an order are the relevant dates for determining limitation. The ratio of this distinction may also be founded on the principle that the Government is bound by the proceedings of its officers but persons affected are not concluded by the decision.

Section 35E comes under the latter category of an authority exercising its own powers under the Act. It is not correct to equate the Board, as contended by Shri Gaurishankar Murty, to one of the parties to a quasi judicial proceeding before the Collector and the Board's right under Section 35E to the exercise of the right of appeal by an aggrieved assessee from an order passed to its prejudice. The power under Section 35E is a power of superintendence conferred on a superior authority to ensure that the subordinate officers exercise their powers under the Act correctly and properly.

Where a time is limited for the purposes by the statute, such power, as under Section 33A(2) of the Indian Income-Tax Act, 1922 referred to in *Muthia Chettiar* (supra), should be exercised within the specified period from the date of the order sought to be reconsidered. To hold to the contrary would be inequitable and will also introduce uncertainties into the administration of the Act for the following reason. There appears to be no provision in the Act requiring the endorsement, by a Collector, of all orders passed by him to the Board. If there is such a practice in fact or requirement in law, the period of one year from the date of the order is more than adequate to ensure action in appropriate cases particularly in comparison with the much shorter period an assessee has within which to exercise his right of appeal. If, [on] the other hand, there is no such requirement or practice and the period within which the Board can interfere is left to depend on the off-chance of the Board coming to know of the existence of a particular order at some point of time, however distant, only administrative chaos can result. We

are, therefore, of the opinion that the period of one year fixed under Sub-section (3) of Section 35E of the Act should be given its literal meaning and so construed the impugned direction of the Board was beyond the period of limitation prescribed therein and therefore, invalid and ineffective." Thus the Supreme Court did not apply to the context the principles laid down in *Raja Hanish Chandra Raj Singh v. The Deputy Land Acquisition Officer and Anr. Assistant Transport Commissioner (Administrator) U.P. v. Sri Nand Singh* - 1981 (1) SCR 131.

We are unable to find the latter decision in the volume cited. Shri Bajpai also relied on the decision *Shanti Pershad and Anr. v. Competent Authority under the Slum Areas and Ors.* - AIR 1965 Punjab 315 where Rule 8 of the Slum Areas (Improvement and Clearance) Rules, 1957 was considered. The Rules state that an appeal under Section 20 shall be filed within a period of 30 days of the date of communication of the order of the competent authority. It was held that it is only when the competent authority furnishes copy of the order to the applicant that there is communication of the order and it is from the date of such communication that the period is to be reckoned.

7. We are bound by the interpretation placed by the Supreme Court on the relevant words in Section 35E(3) of the Act in the decision of *M.M. Rubber Company* case. The words "from the date of the decision or order of the adjudicating authority" can only be understood as the date of the order and not date of communication of the order. The question arising in this case is what is the date of the order for the purpose of Section 35E(3) of the Act We have referred to the filing of the writ petition by the assessee in the High Court of Bombay. Initially, the Bombay High Court stayed all further proceedings, but subsequently allowed the proceedings to continue and directed that after the order is signed, it shall be kept in a sealed envelope. It was only on 18-6-1984 that the High Court directed sealed envelope to be opened and the order to be shown to the counsel for the parties and a copy of the order to be supplied to assessee's counsel. It was on that date that the sealed envelope was opened. The purpose that was sought to be achieved by these interlocutory orders was to ensure that the adjudication proceedings was not unnecessarily held up, but at the same time to ensure that any adjudication order passed was not effectuated without the permission of the

High Court. Far from there being any possibility of communication of the order to the assessee or to the departmental authorities, the order passed by the High Court effectively prevented any such communication. The order was kept under the custody of the High Court. We can very well visualise a situation where it would have been possible for the adjudicating authority to request the High Court to return the sealed envelope stating that the authority desired to alter the order. Since the order had not been disclosed or made public or communicated to anyone and, in fact, could not have been communicated to anyone because it had been kept in a sealed envelope, the High Court would not have stood in the way of the adjudicating authority taking back the sealed envelope and drafting and signing a different kind of order and returning the same in a sealed envelope to the High Court. This became impossible only on the date on which the sealed envelope was opened and shown to the counsel for the parties. In these peculiar circumstances, we hold that the effective date of the order was not the date on which the order was originally signed by the adjudicating authority but the date on which the sealed envelope was opened and order was shown to the counsel for the parties, namely, 18-6-1991 and since the order of the Board under Section 35E(1) was passed on 29-5-1992, it must be taken to have been passed within one year from the effective date of the order, namely, 18-6-1991 and was within time. The Supreme Court in M.M. Rubber Company's case decided only the controversy whether time begins to run from the date of the order or from the date of communication of the order. The observations of the Supreme Court in paragraph 12 of the reported judgment support the view we have taken. The contention that order of the Board was passed beyond the period stipulated and, therefore, the departmental appeal is ineffective and barred is unsustainable.

8. The next contention is that the departmental appeal or application under Section 35E(4) of the Act was filed more than three months after the communication to the Commissioner (L & A) of the order of the Board and hence, is barred by time. The requirement of law is that the application is to be filed within three months from the date of communication of the order to the adjudicating authority. The order was passed on 29-5-1992. Our attention is invited to the endorsement at the end of the order showing that copy of the order was endorsed to the Collector of Central Excise, New Delhi, the Principal Collector of Central Excise, New Delhi guard file,

CVO (CBEC), Director General of Anti Evasion and the Principal Collector of Central Excise, Bombay. The copy was not endorsed to the adjudicating authority, namely, the Director (L&A) which post was subsequently re-designated as Commissioner (L & A). In the application dated 13-12-1995 filed by the Commissioner (L & A) it was stated that he did not have any knowledge of the direction of the Board until he was informed by the Deputy Director (Inv.), Directorate General Anti Evasion, New Delhi by letter dated 7-12-1995, enclosing a copy of the Board order. A copy of the letter is also filed along with the application. The letter invited the attention of the Commissioner (L & A) to the order of the Board and in particular last para of the order containing the direction to the Commissioner (L & A) to file appeal before the Tribunal. The letter also informed the Commissioner (L & A) that the assessee had filed appeals before the Tribunal which were coming for final hearing on 14-12-1995. The Commissioner was requested to confirm whether the appeal was filed and if so, hand over a copy of the appeal for briefing the Departmental Representative as well as the advocate. The application referred to is supported by an affidavit sworn to by the Commissioner (L & A) where he stated that the contents of the application are true and correct. The assessee did not file any rebuttal to this application or affidavit. We do not agree with the contention raised by Shri Khaitan that the letter relied on itself is suggestive of the inference that the Commissioner (L & A) was aware of the Board's order even prior to the letter. No such inference is possible from the contents of the letter. Having regard to these circumstances, we accept the contention of the department the Commissioner (L & A) came to know of the order only on or immediately after 7-12-1995 and since the departmental appeal or application was filed on 14-12-1995, it was within the period prescribed under Section 35E(4) of the Act.

9. The last contention in regard to maintainability of the departmental appeal is that since the High Court of Bombay by order dated 18-6-1991 specifically allowed the parties to file an appeal before the Tribunal within three months and directed the Tribunal to entertain the appeal without regard to the period of limitation for filing appeal and since the appeal was not filed within three months from 18-6-1991, the appeal is barred by time. We are afraid, we are unable to agree with this submission. We have already held that the appeal or the application under Section

35E(4) of the Act has been filed within time. The High Court of Bombay when it passed the order on 18-6-1991 was not aware of the non-communication of the Board's order to the Commissioner (L & A) and evidently proceeded on the basis that the appeals of both parties would have become barred by time by that time and since on the order of the High Court the adjudicating order was placed in a sealed envelope in the High Court, thought it necessary to pass an order enabling the parties to file an appeal within three months notwithstanding the expiry of the period of limitation prescribed for the purpose. If, as a matter of fact, the period of limitation has not expired, the order of the High Court cannot have the effect of limiting the period of limitation allowed for filing an appeal or application or of altering the date of commencement of the period of limitation prescribed for the purpose. The direction of the High Court was only an enabling one and does not affect the statutory rights of the parties. Therefore, we reject the above contention. Thus, we hold that Appeal No. E/1846/95-A is maintainable.

10. Now we proceed to deal with the other contention of the parties in this appeal. It is contended by learned counsel for the Department that the Collector was in error in holding that even adopting the extended period of limitation under proviso to Section 11A of the Act, the third show cause notice was barred by time. Section 11A relates to recovery of excise duty not levied or not paid or short-levied or short-paid or erroneously refunded. The provision requires service of notice on the person chargeable with the duty, requiring to show cause why he should not pay the amount specified in the notice. The notice should be served within six months from the relevant date. Under the proviso the period is extended to five years from the above date. "Relevant" date is defined in Clause (ii) of Sub-section (3) of Section 11 A. Sub-clause (b) of Clause (ii) states that in a case where duty of excise is provisionally assessed under the Act or the rules, the date of adjustment of duty after the final assessment thereof will be the "relevant date". The contention of the Department is that for the period covered by the third show cause notice, there were only provisional assessments and no final assessments had been made and, therefore, even on the date of the show cause notice the period of limitation had not started to run. This contention is rebutted by the learned counsel for the assessee, according to whom, during the period in question removal was under the physical control procedure where the

assessments were necessarily final and, therefore, Section 11A(3)(ii)(b) is not attracted and the period of limitation started to run from the very day on which the duty was liable to be paid, namely, the relevant dates of removal during the period and, therefore, the notice which was beyond five years of the last date of the period in question was beyond time.

11. Unfortunately, the Collector did not apply his mind in regard to the above question. He took it for granted that the dates on which duty on removals of goods during the period was to be paid were the dates on which period of limitation commenced without advertent to the definition of "relevant date" occurring in Section 11A(3)(ii) of the Act. From the order we find some support to the contention of the Department. At page 113 of the order in paragraph 11 there is an observation "Further, assessments in Baroda Collectorate were on provisional basis". It is not clear if this statement was made after due verification. It is the contention of the Department before us that the assessments relating to the Bombay factory could only have been provisional, since the writ petition was pending in the Bombay High Court as W.P. 42/1978 in respect of admissibility of deductions of post manufacturing expenses. Reliance is placed on the observation in paragraph 4 of the order of the Board in relation to factories at Hyderabad and Bombay that the price lists had not been approved. As rightly pointed out by Shri Khaitan, these are matters of fact requiring careful verification and consideration, but the Collector did not consider these aspects. Whether the assessments for the period in question were provisional or not is crucial to identify "the relevant dates" in regard to the period in question and also to determine whether the third show cause notice was barred by limitation. This exercise may require a careful sifting of a mass of records and cannot be undertaken by us, particularly in the light of the absence of relevant records relating to assessments. We are, therefore, constrained to hold that the proceeding arising from the third show cause notice has to be remanded for fresh consideration. The impugned order in relation to the subject matter of the third show cause notice has to be set aside and the appeal of the Department allowed.

12. The three show cause notices were taken up together for adjudication, since in the view of the Collector the basic question involved was the same and duty

demanded was for an over-lapping period.

The assessee did not file replies to any of the show cause notices.

Assessee wanted to have inspection of documents before filing replies and the process of inspection was delayed and stretched. There was correspondence regarding supply of copies of documents. Inspection of documents was made some time in May and June, 1987 and further time for inspection was denied. Personal hearing was granted on 29-6-1987 and 13-6-1987 and adjournment was sought and hearing was adjourned finally to 15-7-1987. Even at that stage, further time for inspection was sought and a further application for cross-examination was made, though unsuccessfully. Meanwhile, writ petitions were pending in several High Courts, which were ultimately disposed of. Since we are remanding the proceeding arising from the third show cause notice, we think it necessary in the interests of justice to give a last opportunity to the assessee to file reply and documents and also an application for cross-examination only of such witnesses as are required to be cross-examined and indicating the purpose of cross-examination therein.

The reply to the documents and application for cross-examination should be filed within two months from today. If the reply and documents are filed within two months from today, they shall be received. If the application for permission to cross-examine the witnesses as indicated above is filed within two months from today, the adjudicating authority shall pass a speaking order on the same and if cross-examination is allowed in regard to any witnesses, give reasonable opportunity of cross-examination of such witness or witnesses. The adjudicating authority shall also give an opportunity of personal hearing and pass a fresh order. It is made clear that no more inspection shall be allowed as a matter of right, though if the assessee desires to inspect any particular document within the period of two months from today, that may be allowed subject to the condition that the question of inspection shall not be put forward as an excuse to delay filing reply or documents or cross-examine the witness if permission is granted and personal hearing.

13. These appeals arise out of the part of the order in relation to the subject matter of the first and second show cause notices dated 26-8-1983 and 19-4-1984 respectively and covering the period from 1978 to 1983 in respect of the factory at Bombay and Baroda respectively.

The Collector has recorded findings on various matters in dispute and directed the differential duty to be worked out by the representatives of the Bombay and Baroda Collectorates. Shri Khaitan has urged the following contentions :- (i) The first and second show cause notices are barred by time for the reason that the larger period of limitation provided under proviso to Section 11A of the Act is inapplicable.

(ii) The impugned order has traversed beyond the scope of the allegations and grounds contained in the two show cause notices and has relied on the allegations and grounds contained in the III show cause notice as well as the documents relied on in the third show cause notice to uphold the claim of the Department in relation to the period covered by the first and second show cause notices and this was illegal.

(iii) There has been violation of principles of natural justice by denial of opportunity to cross-examine persons whose statements have been relied on, by denial of opportunity to inspect documents and by denial of adequate opportunity of hearing.

(iv) The alleged extra amounts realised, in any event, have to be regarded as cum-duty and the amount of duty should have been determined in accordance with the judgment in MRF Ltd. case 1995 (77) E.L.T. 434.

(v) It was beyond the jurisdiction of the Collector to direct officers of the two Collectorates to quantify the demand.

14. We will first deal with the contention that show cause notices I and II are barred by time. If the extended period of limitation is available, the notices are admittedly not barred by time. According to the assessee, the extended period of limitation is not available and since the period of limitation available is only six

months, almost the entire period covered in the two show cause notices would be barred by time and if at all, only a small part would be within six months. The matter has not been dealt with by the Collector in the impugned order, evidently because the assessee did not file reply and did not effectively participate in the personal hearing. But we cannot deny the assessee's right to raise this question in appeal as bar of limitation goes to the root of the matter. Proviso to Section 11A of the Act contemplates certain situations warranting larger period of limitation.

The situations are where the non-levy, non-payment, short levy or short payment were 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 rules with intent to evade payment of duty.

15. Show cause notices I and II are almost identically worded. The notices state that the assessee was required to submit price lists with declaration of correctness of the same, in the course of inspection a document styled "standard terms and conditions of business in the wholesale buyers" came to the notice of the office containing terms relating to right of the assessee to ask for security deposit and vary the amount of the deposit from time to time at its discretion and the liability of the assessee to pay interest at the rate of 3% per annum or at such rates as may be decided by the assessee from time to time.

The notice proceeds to state that it was observed that the assessee had exercised the right in this regard and fixed varying deposits from wholesale buyers and the assessee had not accepted the full amount of the deposit from any of the wholesale buyers, that acceptance of a minor part of the deposits resulted in creating an outstanding of the deposits by the buyers to the assessee in subsequent period. It was also observed that the sale proceeds were being adjusted against outstandings in the deposits. By such adjustment the assessee created sales outstanding from buyers on which interest at the rate of 13 to 20% had been charged from time to time. This arrangement resulted in a situation where the assessee derived continuous flow of interest on outstanding sales at the rate of 13 to 20% depending on the prevailing rate while assessee was required to pay only 3% towards the accumulated deposits realised by adjustment of sale

proceeds towards outstanding deposits. The difference in the rates of interest on the two counts was flow back towards the assessee and should be reflected in the assessable value. Such additional consideration should have been declared in the price lists, but this was not done. Clearances were made without declaring the correct value and consequently without paying correct duty. The allegations attracting the proviso to Section 11A are as follows : "(c) By not disclosing the arrangement with the wholesale buyers regarding the acceptance and adjustment of deposits to the approving authority, the assessee appears to have suppressed vital facts which would have helped in arriving at the correct assessable value.

(d) By providing a false declaration in the body of the price list to the effect that there is no additional consideration flowing directly or indirectly back to them, wilful mis-statement and suppression of facts appear to have been patent." 16. The answer of the learned counsel for the assessee to the above allegations is one of denial based on various documents which, it is said, show that; there has been total disclosure of these facts to the Department and all relevant information was within the knowledge of the departmental officers. Reference is made to an earlier show cause notice dated 1-2-1977 issued by the Assistant Commissioner in regard to the deduction of post manufacturing expenses out of the price in the price list from 1-10-1975 onwards approved provisionally. The notice refers to "terms and conditions for supply to wholesale buyers." Reference is also made to letter dated 12-7-1979 sent by the assessee to the Assistant Collector enclosing a set of forms used by the assessee and its dealers which, it is stated, fully disclosed the arrangement with the wholesale buyers regarding security deposit, interest thereon etc. Learned counsel referred to notice dated 29-10-1979 which is not seen in the paper books and so also the letter dated 1-7-1980 referred to by the learned counsel. Reliance is placed on the document dated 6-1-1982 forwarded by the assessee to the officer concerned containing legal opinion. Though the date is seen in the index, the copy of the document produced does not contain any date.

Reliance is also placed on another letter dated 5-8-1982 and letter dated 6-8-1982 written to the Minister of State for Finance. Reliance is placed on copies of balance-sheets, which are not before us.

Reference is made to order dated 31-10-1977 which refers to the terms and conditions of sale. Reliance is also placed on a document styled as "standard terms" produced before us.

17. As we have indicated earlier, Collector had no opportunity to apply his mind in regard to these documents and to verify whether there was full disclosure of relevant facts or whether there was any fraud or wilful mis-statement or suppression of facts. Since this is an important question involving appreciation of facts in the light of relevant principles of law, we are of the opinion that interests of justice require that the Collector considers the matter in all its aspects. Therefore, we are constrained to remand this part of the proceedings also to the adjudicating authority.

18. The next contention is that the order impugned by the assessee has traversed beyond the scope of the allegations and grounds contained in the show cause notices No. I and II and has relied on the allegations and grounds contained in the third show cause notice as well as the documents relied on therein to uphold the claim of the Department in relation to the period covered by the former notices and this was illegal. We have already indicated that on the question whether first and second show cause notices were barred by time, the matter requires fresh consideration at the hands of the adjudicating authority. We have referred to the substance of the first and second show cause notices.

The basis of these two show cause notices is that the assessee fixed varying amounts of security deposits from the wholesale buyers stipulating very low interest and when sale proceeds were received from the wholesale buyers, they were credited to the security deposit account (with liability for low interest) and account of sale price was deliberately allowed to remain in substantial arrears with liability on the part of the wholesale buyers to pay very high rate of interest.

This strategy was adopted so that additional sale consideration was received by way of differential interest. The basic allegation in the third show cause notice is that the assessee adopted the strategy of generation of extra profit margin in the hands of the wholesale buyers and controlling the prices at all levels so as to reduce the invoice prices charged to wholesale buyers and use part of the extra

profit margin to meet advertisement and sale promotion expenses till the end of February, 1979 and substantially increasing the extra profit margin thereafter and get back the same in the guise of overdue interest under the security deposit scheme. A comparison of the allegations in the third show cause notice with those in the earlier notices would show that in the third show cause notice there was additional allegation regarding extra profit margin. As we have already indicated, assessee did not file reply to any of the show cause notices. We see no reason why the details regarding extra profit margin submitted in the third show cause notice cannot be looked into for the purpose of first and second show cause notices. The impugned order was preceded by common enquiry into all the three show cause notices. Even after remand, it would be in the interests of both parties and in the interests of expedition that a common enquiry is conducted in regard to all the three show cause notices. Learned counsel for the assessee has referred to a number of decisions to stress the importance of show cause notice, sticking to the allegations of the show cause notice and the effect of the adjudicating authority traversing beyond the purview of the allegations in the show cause notice. Decisions indicate that requirement of show cause notice is based on a statutory incorporation of such principle of natural justice and the requirement can be ignored only at the peril of the proceeding being regarded as illegal. It is also true that ordinarily enquiry by the adjudicating authorities is confined to the allegations of the show cause notice. We are not referring to the decided cases, since these propositions are not in dispute. But one cannot overlook that the basis of the requirement of a show cause notice is the principle audi alteram partem. An order leading to adverse civil consequences to a person should not be passed without giving an opportunity to him to, defend his interests. The purpose of law is to see that the assessee is not prejudiced by being condemned unheard or by creating a situation where he cannot defend himself in an appropriate manner. The allegations in the third show cause notice have been before the assessee since the last six years.

Till now the assessee did not take the trouble of setting out his case regarding these allegations. We intend to give such an opportunity to the assessee in view of the remand we are constrained to order. Since we are now giving an opportunity to the assessee to submit replies to all the three show cause notices and since the

assessee has been aware of these allegations during the last several years and a common enquiry is required to be held, we see no legal difficulty in holding that the allegations contained in the third show cause notice which are relevant and apposite to the period covered by first and second show cause notices, can be looked into for the purpose of adjudication.

19. We do not intend to expatiate on the contention of denial of opportunity to cross-examine persons whose statements have been relied on and denial of opportunity to inspect documents and denial of adequate opportunity of hearing, since remand is being ordered and we have already given appropriate directions in regard to the third show cause notice, which directions shall apply to the adjudication of the first and second show cause notices also. (see directions in paragraph 12 of this order).

20. We do not propose to examine the contention that the alleged extra amounts realised have to be regarded as cum-duty, since this matter will be open before the adjudicating authority on remand. Last contention that it was beyond the jurisdiction of the Collector to direct the officers of the two Collectrates to quantify the demand appears to be justified. It is for the adjudicating authority to quantify the demand. That function cannot be delegated to subordinate officers. Of course, it is always open to the adjudicating authority to take the assistance of other officers in regard to calculation and the like, but the responsibility shall be that of the adjudicating authority and the finding shall be recorded by the adjudicating authority himself.

21. In the light of what we have indicated above, we do not propose to go into the contentions advanced on merits in relation to show cause notices-first and second. Whatever contentions have been raised before us may be raised before the adjudicating authority after remand.

22. In the result, the impugned order is set aside and the proceedings arising out of the three show cause notices are remanded to the adjudicating authority [Commissioner (L & A)] for fresh disposal in accordance with law and the observations and directions contained in paragraphs 11,12,17, 19, 20 and 21. The appeals are allowed as indicated above.

