2013 (288) E.L.T. 514 (Guj.)

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
Bhaskar Bhattacharya, ACJ. and J.B. Pardiwala, J.

COMMISSIONER
Versus
MEGHMANI DYES & INTERMEDIATES LTD.

Tax Appeal Nos. 854 of 2010 with T.A. No. 1731 of 2010, decided on 12-3-2012

Demand - Limitation - Extended period - EOU allowed to sell in DTA specified quantities goods - ER-2 Returns filed by them on monthly basis, giving details quantities of DTA sales, quantities of goods manufactured and exported - Revenue not contending that EOU failed to declare details/information required under ER-2 Returns or that it was wrong or false - *HELD :* Details like total quantity of goods manufactured in a month with reference to each of the goods, quantities physically exported, and quantity as well as value of each of goods cleared, would enable Central Excise officers to easily verify total quantity manufactured, exported and cleared in DTA - Details of excise notification availed would enable Central Excise officer to check if its availment was in order - In that view, Revenue's contention that ER-2 Returns was not sufficient to find out if EOU exceeded permissible limit of DTA clearance was not tenable - It was more so as format of ER-2 Returns is prescribed by Government and EOU could not be accused of suppression of facts if details/information provided by him were in accordance thereof - Extended period was not invocable - Section 11A of Central Excise Act, 1944. - *The format of ER-2 Returns specified by the Central Government shows that details of manufacture and clearance of goods of the concerned month are to be declared at clause (iii) of the Returns and all the relevant details like description of goods, classification number of the goods, unit of quantity, etc. along with the quantity of each of the goods manufactured and the quantities of physical export as well as the value of physical export, deemed export and also the quantities of each of the goods cleared in DTA in terms of quantity as well as value have been shown in the Return. Under Clause 4A of the Returns, details of clearances in DTA and deemed export and duty payable are to be disclosed and the Excise notification availed along with serial number in the Excise notification are also required to be submitted under Clause 4A of the Return. [paras 32, 33, 34, 35]*

Demand - Limitation - Extended period - Revenue has to establish by cogent evidence fraud, collusion, wilful mis-statement, suppression of facts or contravention of statutory provision/rules with intent to evade payment of duty - Section 11A of Central Excise Act, 1944. *[para 43]*

Appeal to High Court - Grounds - Fraud, collusion, wilful mis-statement, suppression of facts or contravention of statutory provision, for invocation of extended period - These are pure question of fact, which cannot be gone into by High Court under Section 35G of Central Excise Act, 1944, except on ground of perversity - High Court would be very slow to discard Tribunal's finding on a question of fact, even if on review to evidence it may arrive at different conclusion. *[para 44]*

Appeals dismissed

CASES CITED

Coaltar Chemicals Manufacturing Co. v. Union of India — 2003 (158) E.L.T. 402 (S.C.) — **Distinguished** [Paras 26, 38]
Collector v. Chemphar Drugs & Liniments — 1989 (40) E.L.T. 276 (S.C.) — **Distinguished** [Paras 25, 36, 37, 38]
Commissioner v. Bajaj Auto Ltd. — 2010 (260) E.L.T. 17 (S.C.) — *Relied on*............ [Paras 27, 39]
Commissioner v. CEGAT — 2006 (202) E.L.T. 758 (Mad.) — *Relied on*.............. [Paras 30, 40, 42]
Commissioner v. Jindal Aluminium Ltd. — 2000 (122) E.L.T. 645 (Kar.) — *Relied on* [Paras 30, 40, 41]
Commissioner v. Malwa Cotton Spinning Mills Ltd. — 2009 (244) E.L.T. 503 (P & H) — *Referred* [Para 29]

DEPARTMENTAL CLARIFICATION CITED

C.B.E. & C. Circular No. 7/2006-Cus., dated 13-1-2005.. [Para 9]

REPRESENTED BY : Shri Y.N. Ravani, for the Appellant.
Shri Paresh M. Dave, for the Respondent.

[Judgment per : J.B. Pardiwala, J. (Common CAV)]. - As common questions of fact and law are involved in both the Appeals, they were heard together and are being disposed of by this common judgment and order.

2. Tax Appeal No. 1731 of 2010 is the main matter as CESTAT, Ahmedabad has passed a detailed order on appeal of the assessee i.e. respondent herein, which is challenged in Tax Appeal No. 1731 of 2010, whereas the order of the CESTAT challenged in the other Tax Appeal No. 854 of 2010 was passed subsequently by the CESTAT on the basis of the order passed in the case of Megmani Industries Limited, which is challenged in Tax Appeal No. 1731 of 2010.

Tax Appeal No. 854 of 2010

3. This Appeal under Section 35-G of the Central Excise Act, 1944 is at the instance of the Revenue and is directed against the Order No. A/74/WZB/AHD/2010, dated 6th January 2010 in Appeal No. E/1296/2009 passed by the Customs, Excise and Service Tax Appellate Tribunal, Western Zonal Bench, Ahmedabad, and thereby the Appellate Tribunal allowed the appeal of the assessee to the extent of remanding the matter to the Commissioner for a fresh decision after considering the submissions of the assessee as well as the Revenue.

Tax Appeal No. 1731 of 2010

4. This Appeal under Section 35-G of the Central Excise Act, 1944 is at the instance of the Revenue and is directed against the Order No. A/47/WZB/ AHD/2010, dated 5th January 2010 in Appeal No. E/1290/2009 passed by the Customs, Excise and Service Tax Appellate Tribunal, Western Zonal Bench, Ahmedabad, and thereby the Appellate Tribunal allowed the appeal of the assessee to the extent of remanding the matter to the original adjudicating authority, directing to consider the eligibility in DTA with respect to each item and the applicability of the words "similar goods" to be adopted in its true meaning.

Questions of law :

5. In Tax Appeal No. 1731 of 2010, the Revenue has raised the following questions of law :

(a) Whether in the facts and circumstances of the case and in law, the Hon'ble CESTAT was justified in holding that extended period cannot be invoked, even when the assessee has merely mentioned the Notification number in their E.R.2 monthly returns and suppressed the vital facts that they have crossed their eligible limit of clearance of their goods in DTA, as provided under para 6.8(a) of the Foreign Trade Policy 2004-09, read with the Notification No. 23/2003-C.E., dated 1-3-2003?

(b) Whether in the facts and circumstances of the case and in law, the Hon'ble CESTAT was justified in holding that no evidences were brought out to show that the returns were incomplete, even when the relevant information regarding product-wise details were not submitted by the assessee in their E.R. 2 returns, and which were submitted only during the course of investigation.

(c) Whether in the facts and circumstances of the case and in law, the Hon'ble CESTAT was justified in not discussing and not passing any orders in respect of demand of short-payment of Education Cess.

6. In Tax Appeal No. 854 of 2010, the Revenue has raised the following questions of law :

(i) Whether in the facts and circumstances of the case and in law, the Hon'ble CESTAT was justified in holding that the extended period is not sustainable in this case, as they have already taken a view in the other case that extended period is not invokable.

(ii) Whether in the facts and circumstances of the case and in law, the Hon'ble CESTAT was justified in holding that, there is no proper Annexure to the Show Cause Notice is given to identify whether the demand is in respect of same goods or not, even when the Annexure was annexed to the Show Cause Notice, in respect of both the products separately, by giving full details thereof.

(iii) Whether in the facts and circumstances of the case and in law, the Hon'ble CESTAT was justified in remanding back the issue of "similar goods" without any discussion, as another order passed by them was also remanded back by them, even when the demand issued in both the cases are in respect of different products.

(iv) Whether in the facts and circumstances of the case and in law, the Hon'ble CESTAT was justified in not discussing and not passing any orders in respect of demand of short-payment of Education Cess.

Facts of the case :

7. The respondents-assessees have been manufacturing goods, namely, dyes i.e. colouring material used for dyeing and colouring fabrics and also agro-chemicals in the nature of insecticides and pesticides. The assessees are 100% Export Oriented Undertakings and, therefore, they are required to export all the goods manufactured in their units. However, vide paragraph 6.8 of the Export-Import Policy, all EOUs are allowed to sell goods upto 50% of the value of export in Domestic Tariff Area i.e. the local market, if they were permitted to sell goods in DTA by their monitoring agency, namely, the Development Commissioner under the EXIM policy. By a Central Excise Notification No. 23/2003 dated 31st March 2003 as amended, EOUs are allowed to pay concessional rate of excise duties for their sales made in DTA, subject to various conditions. The relevant condition for the present case is that the goods being cleared in DTA were similar to the goods which were exported.

8. The respondents of both the Appeals have been allowed to sell in DTA specified quantities of dyes as well as agro-chemicals by the Development Commissioner by issuing specific permission letters, wherein the quantities of goods allowed to be sold in DTA and also the value of the goods permitted for such clearance have also been clearly mentioned. The DTA sale permissions were for "agro-chemicals, dyes, remnants/waste" and the total value of these goods permitted for clearance was also mentioned in the DTA sales permission issued by the Development Commissioner. Accordingly, the respondents sold various quantities of dyes as well as agro-chemicals on payment of concessional rate of excise duty during the period from 2004-05 to 2008-09. It is the case on behalf of the assessees that all the details of the total quantities of goods manufactured in a month, the goods exported during the month, the goods cleared by way of deemed exports i.e. sold to other EOUs and the goods cleared in DTA were submitted on monthly basis by filing Returns in form ER-2 prescribed under Rule 17(3) of the Central Excise Rules, 2002 and Rule 9(7) of the Cenvat Credit Rules, 2004. These details were submitted at Clause 3 of the Returns. For DTA clearances, the Notification number i.e. 23/2003 and also the Serial Number 2 of the Notification under which concessional rate is allowed were also shown under Clause 4A of the ER-2 Returns. Further, details of all the Central Excise invoices with their number were also submitted at the end of the Returns, and copies of these invoices under which DTA clearances were made on payment of concessional rate of excise duty were also submitted with the Returns. No objection was raised by the Range and Divisional Central Excise Officers for payment

of excise duty at concessional rate on such DTA clearances for the entire period from 2004-05 to 2008-09, and the assessments were also finalized and concluded.

9. Record reveals that thereafter in view of a Circular No. 7/2006-Cus., dated 13th January 2005 issued regarding valuation of the goods imported in India for assessing customs duty on such imported goods, a show-cause notice dated 31st March 2009 (in case of Tax Appeal No. 1731 of 2010) and a show-cause notice dated 4th February 2009 (in case of Tax Appeal No. 854 of 2010) came to be issued calling upon the assessees to show-cause as to why excise duty should not be recovered on DTA clearances for the entire period from 2004-05 to 2008-09 on the ground that the goods cleared in DTA were not similar to the goods exported and, therefore, payment of excise duties at concessional rate on such DTA clearances was illegal.

10. Record reveals that for invoking extended period of five years, instead of the normal period of one year for demanding duties, the proviso to Section 11A(1) of the Central Excise Act was invoked in the show-cause notices by alleging that the respondents had not disclosed material and relevant facts to the Central Excise authorities as the goods cleared in DTA were not similar to the goods exported and, therefore, concessional rate of duty was availed by the respondents suppressing the facts from the department.

11. Record reveals that the demand was raised in the notices on the basis that the respondents were permitted to clear in DTA 50% quantities of export made by them but the goods cleared in DTA were in excess of the permissible limit of 50% of exports.

12. It appears from the materials on record that the case of the Revenue as regards the DTA clearances in excess of 50% of the export is based on the fact that the respondents were allowed to sell in DTA 50% quantity of the export of a particular variety of dyes and 50% of the export of a particular dye of insecticides-pesticides because DTA sale was permissible for the goods similar to the goods exported.

13. It appears that the case of the department was that if a particular variety of dyes (for example, dyes of particular colour and composition) was exported during a financial year, then 50% quantity of that variety (i.e. dyes of the same colour and composition) was permitted to be sold in DTA at concessional rate of duty under Notification No. 23/2003 and similar is the case so far as agro-chemicals are concerned i.e. if a particular type of insecticide/pesticide was exported during the financial year, then 50% quantity of only that insecticide/pesticide to be sold in DTA at concessional rate of excise duty. The Revenue worked out a figure of total export of a particular variety of dye and a particular kind of insecticide/pesticide for each of the financial year during the above period and raised demand of excise duty for those dyes and insecticides/pesticides which, according to the Revenue, were not of the same kind and nature.

14. The assessees' case all throughout appears to be that all dyes were goods of a kind and when the Development Commissioner being the monitoring agency for EOUs had also permitted DTA sales for dyes (without specifying the varieties or colour or composition) it was within their right to sell in DTA any dyes regardless of the colour or composition because all dyes were in the nature of similar goods as contemplated under Notification No. 23/2003-C.E., and for agro-chemicals too, it was the assessees' case that it was not possible to sell a particular type of insecticides or pesticides in India if their product was exported to a particular foreign country for use upon there depending upon their soil conditions, crop grown, rainfall and such other factors prevailing in the importing country and, therefore, any insecticide/pesticide could be sold in DTA as against the export of similar goods made to foreign countries.

15. Record reveals that the Commissioner of Central Excise confirmed the demand of duty of Rs. 3,31,23,535 (Tax Appeal No. 1731 of 2010) under the provisions of Section 11A(2) of the Central Excise Act, 1944 and duty of Rs. 1,43,50,130 (Tax Appeal No. 854 of 2010) under the provisions of Section 11A(2) of the Central Excise Act, 1944.

16. The assessees challenged the order passed by the Commissioner of Central Excise before the Appellate Tribunal and the Appellate Tribunal took the following view while deciding Appeal No. E/1290/2009 (Tax Appeal No. 1731 of 2010) :

> "...In this case what was required to be considered was whether the definition of "similar goods" available in Customs Valuation Rules can be applied to the facts of the case. Basically, the issue involved appears to be covered by the decisions cited by the learned advocate. The facts were not relevant but ratio of the decision as regards words "similar" was to be considered. Therefore, these decisions are applicable. Ratio of these decisions is that definition available in the Customs Act cannot be used in respect of Notification issued under another enactment. In such cases, common parlance or dictionary meaning has to be applied. Therefore, we find this issue has not been dealt with properly by the Commissioner. We could have considered this issue here in the Tribunal but for the fact that there is no examination of the goods in question which have been cleared in the DTA in terms of definition of similarity. In our opinion, in such cases, there has to be examination in respect of each product to show that this product is not similar to the one exported and why benefit of notification is not available to this particular product. In the absence of clear finding in respect of each product, we consider the order would be incomplete. As already observed by us in respect of dyes, there seems to be clarity in view of the fact that demand shown under the heading VAT dyes would give an impression that department has accepted that VAT dyes, OBA and solvent dyes form distinct categories. There is no finding as regards agro-chemicals which are similar and if they are not similar why they are not similar. Commissioner has to consider all these facts and give finding on the issues. Therefore, we remand the matter to the Original Adjudicating Authority, who shall consider in respect of each item the eligibility in DTA and also which meaning of "similar goods" to be adopted. We have already held that extended period cannot be applied. Appellants are to be given proper opportunity to present their case before the final decision is taken."

17. In the same manner, the Tribunal, while deciding Appeal No. E/1296/2009 (Tax Appeal No. 854 of 2010), took the following view :

> "Appellant is a 100% EOU and in terms of para 6.8 of Foreign Trade Policy and Exemption Notification No. 23/2003-C.E., dated 31-3-2003, they are permitted to clear 50% of dye quoted quantity into domestic tariff area. In terms of these provisions appellants were engaged in the manufacture of different types of dyes, made clearances. The department has taken a view that such clearances should be calculated in respect of each dye separately and for the purpose of finding out whether clearances to domestic tariff area were of similar goods which were exported, reliance has to be placed upon customs valuation rules where similar goods have been defined. On this basis extended period has been invoked duty demand has been confirmed and penalty also has been imposed. In a similar case which had come up before this Tribunal and which was heard on 5-1-2010 in appeal No. E/1290/2009 filed by Meghmani Industries Ltd., this Tribunal had considered the very same issue. The only difference being in that case in addition to dyes, appellant was engaged in the manufacture of Agro Chemicals also. Further, in this case, unlike the case which was brought up yesterday, there is no categorization of dyes for the purpose of finding out eligibility and details are not available. Another difference is that for

calculating extended period, Commissioner has taken a view that it should be taken from the end of the financial year. We have already taken a view in the other appeal that extended period is not invokable. Admittedly, the facts in this case are also similar as regards filing of returns, submission of various documents, permission of Development Commissioner and other relevant details applicable for invoking extended period. Therefore, we consider that it would be appropriate to take a similar view as regards extended period in this case also. As regards the clearance of dyes, the learned advocate submits that unlike the other case, here there is no proper annexure to the show-cause notice. Thereby, it is not possible to identify whether the demand made by the department is in respect of the same goods or not. In any case, since the other appeal cited above has been remanded to the Commissioner for a fresh decision in the light of views expressed therein and in this case also as far as dyes are concerned, same logic which was applied to Agro Chemicals would apply, that is to say, there is a need for discussion in respect of each item as to why the benefit of notification cannot be extended, the matter is required to be remanded. Accordingly, we waive the requirement of pre-deposit and allow the stay petition and remand the matter to the Commissioner for a fresh decision after considering submissions made by the appellants if they choose to make submissions before him."

18. Bare perusal of the orders passed by the Tribunal would suggest that the CESTAT, while remanding the case, considered the documents submitted by the assessees to the Central Excise officers for DTA sales and found that the assessees had submitted Returns showing exemption notification availed by them and, therefore, there was no suppression or misdeclaration on their part, as the Central Excise officers who received the Returns were able to verify and confirm whether the clearances were in terms of the notification or not. The CESTAT also appears to have taken the view that there was no evidence adduced by the Revenue to show that the Returns/documents/declarations were incomplete or facts were suppressed or misdeclared. Since the Central Excise invoices were also produced by the assessees, the officers were obliged to verify them and, therefore, it was not permissible to the Revenue to contend that there was no requirement for an EOU to submit invoices and the departmental officers were not obliged to verify such invoices. The Appellate Tribunal also seems to have taken the view referring to the documentary evidence that the demand could be upheld only for a period of one year from the date of the show-cause notice because the assessees were not guilty of any suppression of fact or misstatement while submitting the details and the Returns. However, the most important aspect of the orders of the CESTAT is that, while remanding the case, the Tribunal has directed the Commissioner to decide the issue of meaning of "similar goods".

19. Revenue, feeling aggrieved by the orders passed by the Appellate Tribunal, has come up in Appeal before this Court under Section 35-G of the Central Excise Act.

I. Contentions on behalf of the Revenue :

20. Mr. Y.N. Ravani, learned senior standing counsel submitted that CESTAT has erred in law by holding that the extended period is not sustainable when the assessee has submitted Returns, which would show exemption notification availed by them. He would submit that a 100% Export Oriented Undertaking (EOU) is supposed to manufacture and clear their excisable goods only for export. However, the Government has provided a facility to the EOUs to clear their export goods upto certain value of their export in the Domestic Tariff Area (DTA) on payment of concessional rate of duty. Mr. Ravani heavily relied on the provision of Notification No. 23/2003-C.E., dated 1st March 2003 as amended, under which the assessees have cleared the goods at concessional rate of duty in DTA. According to Mr. Ravani, this benefit of concessional rate i.e. partial exemption from 50% of duty is available subject to various conditions.

21. Mr. Ravani invited our attention to condition No. 2 of the said notification, under which, the exemption was availed of. Condition No. 2 which has been read over is as under :-

"If,-

(i) the goods are cleared into Domestic Tariff Area in accordance with sub-paragraphs (a), (b), (d) and (h) of paragraph 6.8 of the Export and Import Policy;

(ii) exemption shall not be availed until Deputy Commissioner of Customs or Assistant Commissioner of Customs or Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, is satisfied with the said goods including software, rejects, scrap, waste or remnants;

(a) being cleared in Domestic Tariff Area, other than scrap, waste or remnants are similar to the goods which are exported or expected to be exported from the units during specified period of such clearances in terms of Export and Import Policy;

(b) the total value of such goods being cleared under sub-paragraphs (a), (b), (d) and (h) of paragraph of the Export and Import Policy, into Domestic Tariff Area from the unit does not exceed 50% of the Free on Board value of exports made during the year (starting from 1st April of the year and ending with 31st March of next year) by the said unit;

(c) the balance of the production of the goods which are similar to such goods under clearance into Domestic Tariff Area, is exported out of India or disposed of in Domestic Tariff Area in terms of paragraph 6.9 of the Export and Import Policy;

(iii) clearance of goods into Domestic Tariff Area under sub-paragraphs (a), (b), (d) and (h) of paragraph 6.8 of the Export and Import Policy shall be allowed only when the unit has achieved positive Net Foreign Exchange Earning; and

(iv) clearance of goods into Domestic Tariff Area under sub-paragraph (a) of paragraph 6.8 of the Export and Import Policy in excess of 5% of Free on Board value of exports made by the said unit during the year (starting from 1st April of the year and ending with 31st March of the next year) shall be allowed only when the unit has achieved positive Net Foreign Exchange Earning."

22. Relying on this notification, Mr. Ravani vociferously submitted that to avail exemption under any notification, it is the responsibility of the assessees who claims the benefit of such exemption to fulfill all the conditions prescribed under it. He would submit that it was the duty of the assessees to ensure that the exemption availed by them under the notification is in order or otherwise, as the value of goods cleared under DTA was restricted to 50% of the value of the similar goods exported or to be exported by them.

23. The main contention of the Revenue is that the respondents had not disclosed the quantities of goods sold in DTA at concessional rate while filing Returns and, therefore, the officers were not in a position to verify whether DTA sales made at a concessional rate of excise duty were within the limit of 50% of the export made by the respondents during a particular financial year or not.

24. It is submitted that the details shown in ER-2 Returns were not sufficient for the Central Excise officers to ascertain, whether the DTA clearances were within the permissible limit of 50% of the exported goods or not. Mr. Ravani

submitted that the findings of the Appellate Tribunal are mainly on the basis of ER-2 Returns and the same can be termed as erroneous. The Appellate Tribunal ought to have remanded the case for examination of availability of the extended period of limitation also when the case was sent back to the adjudicating authority for deciding the issue of "similar goods".

25. Mr. Ravani relied upon the judgment of the Supreme Court in the case of *Collector of Central Excise* v. *Chemphar Drugs and Liniments*, reported in 1989 (40) E.L.T. 276 (S.C.).

26. He has also relied upon the decision of the Supreme Court in the case of *Coaltar Chemicals Manufacturing Co.* v. *Union of India*, reported in 2003 (158) E.L.T. 402 (S.C.) in support of his contention that the details given to the department in some other proceeding can never be a ground to presume that the details were given by the assessee and information is available to the department.

27. Mr. Ravani also relied upon the decision of the Supreme Court in the case of *Commissioner of Central Excise, Aurangabad* v. *Bajaj Auto Ltd.*, reported in 2010 (260) E.L.T. 17 (S.C.) in support of his contention that though the initial burden is on the department to prove that the situation visualized by the proviso to Section 11A(1) existed, the burden shifts on the assessee once the department is able to produce material to show that the assessee is guilty of any of those situations visualized in the section.

II. Contentions on behalf of the Assessees :

28. Learned advocate Mr. Dave appearing for the assessees submitted that the CESTAT has categorically held in paragraph 4 of the order challenged by the Revenue in Tax Appeal No. 1731 of 2010 that the Returns showing exemption notification availed of by the assessees would indicate that there was no suppression or misdeclaration because the Central Excise officers receiving the Returns would be able to check up whether the clearances were in terms of the notification or not.

29. Mr. Dave submitted that it has also been recorded as findings of fact by the CESTAT that the assessees were not guilty of any omissions which would have prevented the officers to find out the correct case and also that there was no evidence adduced in order to show that Returns/Documents/Decla-rations were incomplete or facts were suppressed. According to Mr. Dave, these findings of fact cannot be disputed unless shown to be perverse because the CESTAT is the last fact finding authority under the Central Excise Law. To fortify this submission, Mr. Dave relied on a decision of Punjab and Haryana High Court in the case of *Commissioner of Central Excise, Ludhiana* v. *Malwa Cotton Spinning Mills Ltd.*, reported in 2009 (244) E.L.T. 503 (P&H).

30. Mr. Dave further submitted that the High Court cannot reappreciate the evidence in appeal under Section 35-G of the Act for concluding that the finding of fact was incorrect. He relied on the judgment of the Madras High Court in the case of *Commissioner of Central Excise, Chennai-II* v. *CEGAT, Chennai,* reported in 2006 (202) E.L.T. 758 (Madras). Mr. Dave has also relied on a Karnataka High Court decision in the case of *Commissioner of Central Excise, Bangalore* v. *Jindal Aluminium Ltd.*, reported in 2000 (122) E.L.T. 645 (Karnataka).

III. Analysis of the contentions :

31. Having heard learned counsel for the respective parties and having perused the materials on record, we find that the entire issue revolves around the true and correct interpretation of the words "similar goods" in the context of the controversy which has been raised in the present case.

32. It will not be appropriate for us to touch or observe anything in this regard as the CESTAT has directed the Commissioner to consider this issue and decide afresh. However, we do not find any merit in the contentions of the Revenue that ER-2 Returns which were filled in by the assessees did not enable the Central Excise officers to find out whether the DTA sales were in excess of the 50% of the quantities of the exported goods or not. We do not find merit in this contention for two reasons : first, it is factually incorrect to suggest that the details of the quantities of DTA sales and the quantities of goods manufactured and goods exported were not available in the Returns. We have perused the ER-2 Returns available on record. The format of ER-2 Returns specified by the Central Government shows that details of manufacture and clearance of goods of the concerned month are to be declared at Clause (iii) of the Returns and all the relevant details like description of goods, classification number of the goods, unit of quantity etc. along with the quantity of each of the goods manufactured and the quantities of physical export as well as the value of physical export, deemed export and also the quantities of each of the goods cleared in DTA in terms of quantity as well as value have been shown in the Return. Under Clause 4A of the Returns, details of clearances in DTA and deemed export and duty payable are to be disclosed and the excise notification availed along with serial number in the excise notification are also required to be submitted under Clause 4A of the Return. It is not the case of the Revenue that the respondents failed to declare the details and information required under ER-2 Returns and it is also not the case of the Revenue that any information declared under ER-2 Returns was wrong or false. On the other hand, we find that the details like total quantity of goods manufactured in a month with reference to each of the goods, quantities of each of the goods physically exported and quantity as well as value of each of the goods cleared in DTA would enable the Central Excise officers assessing such Returns to easily verify the total quantity of goods manufactured, exported and cleared in DTA. Further, details of excise notification number and also serial number of the notification availed for DTA sales shown at Clause 4A of the Return would also enable the Central Excise officers receiving and assessing the Returns to check up whether the exemption availed of was in order or not. Therefore, the Revenue's contention that the details submitted in ER-2 Returns were not sufficient enough to find out whether the respondents exceeded the permissible limit of DTA clearance is not tenable in law. Further, the format of ER-2 Returns is prescribed by the Government and, therefore, an assessee cannot be accused of suppression of facts if the details and information were provided by him in accordance with the format of the Return unless he provides any wrong information in the Return which is not the case as set-up by the Revenue.

33. Record reveals that the details in the prescribed format of ER-2 Returns along with the Central Excise invoices were submitted by the assessees on monthly basis for a period from 2004-05 onwards and, therefore, it is not believable that the Central Excise officers who received the Returns and invoices right from the year 2004-05 were not able to verify the exact quantity of each of the goods exported by the assessees vis-à-vis the DTA clearances made on payment of concessional rate of duty for a long period of five years.

34. Therefore, the findings recorded by the CESTAT that the Central Excise officers receiving the Returns had all

the information to enable him to verify the facts is, therefore, correct and cannot be termed as perverse so as to warrant any interference at our ends.

35. We are of the view that the conclusion arrived at by the CESTAT that the demand was time-barred and the Revenue cannot invoke the extended period of limitation in this case is not based on mere assumptions or presumptions but is based on the conclusion arrived at after considering the documentary evidence on record including ER-2 Returns and Central Excise invoices of the assessees.

36. We shall now look into the judgment which has been relied upon by Mr. Ravani in the case of the *Chemphar Drugs and Liniments* (supra). In the case of *Chemphar Drugs and Liniments* (supra), the Supreme Court in paragraph 8 of the judgment held as under :

> "...Aggrieved thereby, the revenue has come up in appeal to this Court. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. 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. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement 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 came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the product other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence."

37. The judgment of the Supreme Court in the case of *Chemphar Drugs and Liniments* (supra) relied upon by learned advocate Mr. Ravani will not help the Revenue in any manner. In *Chemphar Drugs and Liniments* (supra), the Apex Court has held that extended period of five years was applicable only when something positive other than any inaction or failure on the part of the manufacturer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is established. When the department had full knowledge about the facts and the manufacturers' action or inaction is based on their belief that they were required or not required to carry out such action or inaction, the period beyond six months (now one year) could not be made applicable. In the present case, it is not the case of the department that information that was otherwise required to be supplied to the department was knowingly suppressed or concealed from the department, nor is it the case of the department that information which was supplied by the assessees was in any manner incorrect or inaccurate. We cannot ignore or overlook the clear and unambiguous findings arrived at by the CESTAT with regard to the issue of limitation. The CESTAT, upon perusal of record i.e. the Returns, Declarations, etc., has concluded that no evidence had been brought on record to show that the Returns/Documents/Declarations filed by the assessees were incomplete or that the facts declared therein were either suppressed or misdeclared in any manner. In view of the clear findings of fact recorded by the CESTAT in the present case, we find no reason to interfere with the impugned order under challenge.

38. In the case of *Coaltar Chemicals Manufacturing Co.* (supra) which has been relied upon by the Revenue, the Supreme Court, considered the judgment in the case of *M/s. Chemphar Drugs and Liniments* (supra). The contention before the Supreme Court on behalf of the assessee, relying on *M/s. Chemphar Drugs and Liniments* (supra), was that when the manufacturer in the same situation as appellant has revealed certain information in another proceeding and that information is available to the Department, the enlarged period of limitation available under Section 11A of the Central Excise Act cannot be invoked by the Department. Dismissing the appeal of the assessee, the Supreme Court in paragraph 2 clarified as under :

> "..On the other hand, in a given case whether there is 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, is a question of fact to be established in each case."

39. In the case of *Commissioner of Central Excise, Aurangabad* (supra), the Supreme Court once again considered Section 11A and held in paragraph 12 as under :

> "Section 11A of the Act empowers the central excise officer to initiate proceedings where duty has not been levied or short-levied within six months from the relevant date. But the proviso to Section 11A(1), provides an extended period of limitation provided the duty is not levied or paid or which has been short-levied or short-paid or erroneously refunded, if there is fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty. The extended period so provided is of five years instead of six months. Since the proviso extends the period of limitation from six months to five years, it needs to be construed strictly. The initial burden is on the department to prove that the situation visualized by the proviso existed. But the burden shifts on the assessee once the department is able to produce material to show that the appellant is guilty of any of those situations visualized in the Section."

40. We shall also look into the judgments which have been relied upon by Mr. Dave appearing for the assessees.

41. In the case of *Jindal Aluminium Ltd.* (supra), the Division Bench of Karnataka High Court, in paragraphs 9 and 11 of the judgment, held as under :

> "9. In respect of the second point it is submitted that the documents which was recovered from the transporter were in respect of the excisable goods on which the duty was clandestinely evade. Firstly, we may observe that the question as to whether there is evasion of duty is basically a question of fact. It is not the case of the revenue that the order passed by the Collector or the Tribunal is perverse. No question is framed on that point.
>
> 11. After a finding of fact is recorded by the Tribunal after due consideration of the evidence before it, this Court will not interfere in its jurisdiction under Section 35G. The finding based on inferences drawn from the facts of the case is purely a question of fact. Even if the finding is recorded without any supporting evidence, it could be challenged on the ground of perversity. The finding cannot be said to be based on suspicion, conjecture or surmises. The finding on question

> of fact is open to attack as erroneous in law when there is no evidence to support. If the finding of fact is not challenged, it is binding even on the High Court. IN *CIT* v. *Orissa Corpn. Pvt. Ltd.*, 1986 (159) ITR 78, it was held by the Apex Court that the conclusion of the Tribunal based on some evidence on which the conclusion can be arrived at, no question of law would arise. In *CIT* v. *Indian Woollen Textiles Mills,* 1964 (54) ITR 291, it is held by the Apex Court that it is not open to the High Court to discard the Tribunal's finding on a question of fact, even if on a review to the evidence the Court may arrive at different conclusion."

42. In the case of *Commissioner of Central Excise, Chennai-II* (supra), the Madras High Court, in paragraph 4 of the judgment, held as under :

> "4. Under the hierarchy of quasi-judicial authorities, in the Central Excise Act, at the lowest is the Assistant Commissioner against whose orders appeals lie under Section 35 of the Central Excise Act to the Commissioner (Appeals) and, thereafter, a second appeal to the CEGAT under Section 35B. It may be noted that the second appeal to the CEGAT is not like a second appeal under Section 100 C.P.C., since it is not confined to questions of law. Second appeals under different statutes can have different meanings and different scope. A second appeal under Section 35B of the Central Excise Act is like a first appeal under Section 96 C.P.C. inasmuch as findings of fact can also be gone into and the CEGAT can re-appreciate or reassess the evidence. Thus the orders of the Assistant Commissioner and the Commissioner (Appeals) merge into the order of the CEGAT by the doctrine of merger, and the only order which now survives is the order of CEGAT. Hence the reference to the orders of the Assistant Commissioner and the Commissioner (Appeals) is wholly misconceived, as these orders no longer survive after the order of the CEGAT. The CEGAT has recorded a clear finding of fact that there is no suppression, and hence, obviously, the demand was time-barred since the larger period of limitation under the proviso to Section 11A is not applicable."

43. Thus, the principles of law discernible from the authoritative pronouncements referred to above are plain and clear. To make the demand for duty sustainable beyond the period of six months and upto a period of five years in view of the proviso to Section 11A of the Act, the Revenue is obliged to establish by cogent evidence that the duty of excise has 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.

44. Whether there was any fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of any Act, would be a question of fact depending upon the facts and circumstances of a particular case. In exercise of powers under Section 35G of the Act, a pure question of fact cannot be disturbed except on the ground of perversity. This Court, while deciding an appeal under Section 35G of the Act, would be very slow to discard the Tribunal's finding on a question of fact, even if on a review to the evidence the Court may arrive at different conclusion.

45. In this view of the matter, both the Appeals fail and are hereby dismissed. However, there shall be no order as to costs.