



A.F.R.

Neutral Citation No. -

2026:AHC-LKO:68400

Reserved on: 18.08.2026

Delivered on: 25.09.2026

**HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW**

WRIT - C No. - 1000173 of 1998

Siraj Ahmad

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

Counsel for Petitioner(s)	: R.k.srivastava, Paritosh Shukla, Sukh Deo Singh, Vikas Singh, Virendra Singh
Counsel for Respondent(s)	: A.S.G.I., Kuldeep Srivastava

Court No. - 4

HON'BLE IRSHAD ALI, J.

1. Heard Sri Sukh Deo Singh along with Sri Paritosh Shukla, learned counsel for the petitioner and Sri Kuldeep Srivastava, learned counsel for the respondent.

2. The present writ petition has been filed on following prayer:

“i. issue a writ, order or direction in the nature of mandamus directing the opposite parties not to charge any additional excise duty and the penalty on the unbranded Sada Kimam and the unbranded Kali Patti cheqing tobacco sol / cleared by the petitioner from 09.04.1994 to 26.07.1996 in pursuance to the notice dated 14.03.1997 and the order dated 20.10.1997.

ii. issue a writ, order or direction in the nature of mandamus directing the opposite parties not to levy or any Additional Excise Duty and penalty in pursuance of the impugned orders dated 14.03.1997 (Annexure no.5) dated 20.10.1997 (Annexure-12).

iii. issue a writ, order or direction in the nature of certiorari to quash the order dated 18.11.1997 (Annexure No.15), 20.10.1997 (Annexure No.12) and the notice dated 14.03.1997 (Annexure No.5).

- iv. *issue an ad-interim-order in favour of the petitioner.*
- v. *issue such other orders or directions as it may deem just and proper in the circumstances of the case.*
- vi. *award the cost of the petition to the petitioner.”*

3. Factual matrix of the case is that the petitioner is engaged in the manufacture and sale of unbranded Sada Kimam and unbranded Kali Patti Zarda tobacco at his small-scale factory, namely, M/s Siraj Tobacco Company, situated at Village Ramabhari, Tehsil Biswan, District Sitapur. Sada Kimam is obtained by boiling tobacco leaves and storing the resultant material in drums, whereas the remaining tobacco leaves, after drying, are known as Kali Patti Zarda. The manufacturing process is carried out manually with the aid of labour in the petitioner's small-scale unit.

4. That the aforesaid products, in their crude and unprocessed form, are supplied by the petitioner to other manufacturers/processors, who thereafter process, refine and finish the same and sell them under their respective brand names. The petitioner himself sells the aforesaid products without any brand name.

5. The petitioner commenced manufacture and sale of unbranded Sada Kimam and unbranded Kali Patti Zarda in his factory with effect from April, 1994. Since the annual turnover/clearance of the petitioner remained below Rs.30 lakhs during the relevant financial years, the petitioner was entitled to the benefit of exemption from payment of excise duty under the exemption notification issued by the Central Government under Section 5-A of the Central Excise Act, 1944 read with the Central Excise Tariff Act, 1985.

6. In accordance with Rule 174 of the Central Excise Rules, 1944, the petitioner submitted his declaration dated 08.04.1994 on 09.04.1994 before the Superintendent, Central Excise, Range-I, Sitapur, disclosing his manufacturing activity and claiming the applicable exemption. Similar declarations dated 07.04.1995 and 11.04.1996 were also submitted for the financial years 1995-96 and 1996-97. Thus, the manufacturing activity of the petitioner and the nature of the goods

manufactured by him were throughout within the knowledge of the jurisdictional Central Excise authorities.

7. Since the petitioner's sale proceeds during the financial years 1994-95, 1995-96 and 1996-97 did not exceed Rs.30 lakhs in any financial year, the jurisdictional authorities did not demand or recover excise duty from the petitioner. The petitioner was neither required to obtain registration nor informed that any separate registration was required for payment of Additional Excise Duty (AED).

8. On 03.10.1996, the petitioner's factory was visited by a team of Central Excise officers headed by the Superintendent, Central Excise (Preventive), Sitapur and the Superintendent, Central Excise, Range-I, Sitapur. During the search and seizure, stock of unbranded Sada Kimam and Kali Patti Zarda was taken into possession and a panchnama was prepared. The departmental officers also took away bill books and other records. On scrutiny of the records, the department alleged that the petitioner had cleared excisable goods of a total value of Rs.69,06,605/- during the relevant period.

9. The department, thereafter, bifurcated the period of alleged clearance and issued two separate show cause notices. The first show cause notice dated 29.01.1997 related to the period from 04.08.1996 to 27.09.1996 and also covered the goods seized from the petitioner's factory. The said proceedings were separately challenged by the petitioner in Writ Petition No.4131 (M/B) of 1997.

10. The second show cause notice bearing No. V(15) Seiz/MP/Adj/112/97/5307 dated 14.03.1997 was issued by the Additional Commissioner, Customs and Central Excise, Kanpur, covering the period from 09.04.1994 to 26.07.1996. The notice purported to invoke the extended period of limitation under the proviso to Section 11-A(1) of the Central Excise Act, 1944 and proposed recovery of AED amounting to Rs.6,27,086/- under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11-A of the Act and Section 3(3) of the Additional Duties of Excise (Goods of Special

Importance) Act, 1957. It also proposed imposition of penalty equivalent to the duty alleged to have been evaded.

11. That the alleged clearances relied upon in the show cause notice were as follows:

Financial Year	Bill Nos.	Period	Quantity	Value
1994-95	1 to 93	09.04.1994	to 40,204	Rs.21,25,336
		28.03.1995	kg	/-
1995-96	101	to 03.04.1995	to 48,414	Rs.28,40,129
	192	07.03.1996	kg	/-
1996-97	201	to 07.04.1996	to 33,363	Rs.19,41,140
	237	23.09.1996	kg	/-

The total value was alleged to be Rs.69,06,605/-. The petitioner submits that the demand was otherwise unsustainable as the benefit of exemption was available and the relevant clearances were within the prescribed annual limit.

12. The petitioner submitted a detailed reply dated 12.04.1997 to the show cause notice specifically objecting to the assumption of jurisdiction under the proviso to Section 11-A(1) of the Central Excise Act, 1944. It was categorically stated that the jurisdictional officers had been fully aware since 09.04.1994 of the petitioner's manufacturing activity and that the petitioner had regularly submitted declarations disclosing the nature of the goods manufactured by him.

13. The central issue raised by the petitioner was that the extended period of limitation could not be invoked in the absence of suppression of facts, wilful misstatement, fraud or any deliberate act with intent to evade duty. The petitioner had openly disclosed his manufacturing activity to the department and had acted throughout on the basis of the exemption being granted and availed by him. Consequently, a demand covering a period beyond the normal statutory period could not be sustained.

14. The petitioner had also specifically pleaded that he had not suppressed any material fact or made any misstatement. On the contrary,

the declarations submitted under Rule 174 contained the relevant particulars and were within the knowledge of the jurisdictional authorities. The mere fact that the petitioner had not obtained a separate registration could not, in the circumstances, amount to suppression of facts with intent to evade payment of duty, particularly when the department itself had neither required such registration nor demanded AED from similarly situated small-scale units.

15. The petitioner further submitted that the crude Sada Kimam and Kali Patti Zarda manufactured by him were not marketable in the condition in which they were produced. They required further processing, refining and finishing before they could be sold as finished consumer products. Since marketability is an essential requirement for excisability, the petitioner contended that the goods in their crude form could not be subjected to excise duty merely on the basis of their manufacture.

16. The petitioner also placed before the authorities the departmental practice prevailing in respect of similarly situated small-scale manufacturers. AED was not being demanded from small-scale units manufacturing unbranded Sada Kimam and unbranded Kali Patti Zarda, and such units were not being required to obtain registration under Rule 174. The department itself was, therefore, aware of the prevailing position and of the *bona fide* understanding that no AED was payable by such exempted small-scale units.

17. The departmental understanding is further borne out from the letter dated 10.09.1996 issued by the Superintendent, Central Excise, Lucknow to the Secretary, Lucknow Tobacco Nirmata Samiti, wherein it was stated that there was confusion regarding levy of AED on unbranded tobacco and that registration would be undertaken by the members pursuant to further directions. The said communication demonstrates that the issue concerning AED on unbranded tobacco was itself the subject of departmental clarification and that the position was not free from doubt during the relevant period.

18. Subsequently, the Commissioner, Central Excise, Kanpur issued Instruction No.72/96 dated 24.12.1996 clarifying that small-scale units were also required to pay AED on unbranded chewing tobacco notwithstanding their exemption from registration and maintenance of accounts. This subsequent clarification itself demonstrates that the earlier position was not clear and that the petitioner could not, merely because he had not obtained registration, be attributed with a deliberate intention to evade duty for the earlier period.

19. After submission of the reply dated 12.04.1997, a corrigendum dated 12.06.1997 was issued proposing imposition of penalty equivalent to the duty under Section 11-AC of the Central Excise Act, 1944 on the allegation of fraud, collusion, wilful misstatement, suppression of facts or contravention of the Act or Rules with intent to evade payment of duty. The petitioner submitted a further detailed reply dated 26.06.1997 denying all such allegations and reiterating that the extended period of limitation was not attracted.

20. The petitioner specifically asserted that there was no intention whatsoever to evade duty. The manufacturing activity had been disclosed to the department; declarations had been filed; exemption had been claimed and availed; and the department itself had not demanded AED from the petitioner or similarly situated small-scale units. In such circumstances, the ingredients necessary for invoking the extended period of limitation were wholly absent.

21. At the time of hearing, the petitioner also submitted written submissions dated 06.09.1997 and relied upon several judgments of the Hon'ble Supreme Court, including *Bhor Industries Ltd. v. Collector of Central Excise*, *Collector of Central Excise v. Ambalal Sarabhai Enterprises*, *Tamil Nadu Housing Board v. Collector of Central Excise, Madras*, *Collector of Central Excise v. H.M.M. Ltd.*, *Pushpam Pharmaceuticals Company v. Collector, Central Excise, Bombay* and *Cosmic Dye Chemical v. Collector, Central Excise, Bombay*, in support of the proposition that where the relevant facts were within the

knowledge of the department, the extended period of limitation could not be invoked merely on the basis of non-disclosure or non-registration.

22. Notwithstanding the specific pleas raised by the petitioner, the Additional Commissioner, Customs and Central Excise, Kanpur, by order dated 20.10.1997, confirmed the demand of AED of Rs.6,27,086/- under Section 11-A of the Central Excise Act, 1944 read with Rule 9(2) of the Central Excise Rules, 1944 and also imposed a penalty of an equivalent amount under Section 11-AC of the Act.

23. The adjudicating authority failed to properly consider the material submissions of the petitioner, including the fact that the jurisdictional authorities were aware of the petitioner's manufacturing activity from 1994 onwards; that declarations had been submitted; that the petitioner was enjoying the exemption applicable to small-scale units; that AED was not being demanded from similarly situated units; that the petitioner had never been informed that separate registration was required for AED; and that there was no suppression or wilful misstatement with intent to evade duty.

24. The finding of the adjudicating authority that the petitioner had wilfully failed to obtain registration with an intention to evade AED was contrary to the material on record. The department itself had accepted the petitioner's declarations and had not disturbed the exemption availed by him. The very material relied upon by the department to sustain the requirement of registration consisted of declarations which demonstrated that the petitioner's manufacturing activity was disclosed to the department.

25. The adjudicating authority further failed to properly consider the petitioner's contention that the goods in their crude form were not marketable and that the department had itself treated the issue of levy of AED on unbranded tobacco as one requiring clarification. The subsequent departmental instructions could not retrospectively establish that the petitioner had deliberately suppressed facts or intended to evade duty during the earlier period.

26. The petitioner, being aggrieved by the order dated 20.10.1997, preferred an appeal before the Commissioner, Customs and Central Excise, Allahabad, reiterating all the aforesaid grounds and specifically challenging the invocation of the extended period of limitation under the proviso to Section 11-A(1) of the Central Excise Act, 1944.

27. Vide order dated 18.11.1997, the Commissioner, Customs and Central Excise, Allahabad, upheld the demand of Rs.6,27,086/- towards AED as well as the equivalent penalty. The appellate authority proceeded on the reasoning that although the petitioner had filed the declaration dated 09.04.1994, there was allegedly no evidence before it to establish that declarations had also been filed for April, 1995 and April, 1996. The petitioner thereafter forwarded copies of the declarations dated 07.04.1995 and 11.04.1996 to the concerned authority by registered letter dated 11.12.1997.

28. The finding of the appellate authority regarding non-production of the declarations for the subsequent financial years could not furnish a valid basis for invoking the extended period of limitation, particularly when the said declarations had in fact been submitted and copies thereof were subsequently forwarded to the department. More importantly, the petitioner's manufacturing activity itself was within the knowledge of the jurisdictional authorities throughout the relevant period.

29. The Central Board of Excise and Customs had itself issued directions clarifying that mere non-declaration was not sufficient for invoking the extended period of limitation and that a positive act of misdeclaration or suppression was necessary. The said departmental position was also consistent with the law laid down by the Hon'ble Supreme Court in *Padmini Products v. Collector, Central Excise and Collector of Central Excise, Hyderabad v. Chemphar Drugs and Liniments*.

30. In the facts of the present case, there was no positive act of suppression, wilful misstatement, fraud or collusion on the part of the petitioner. The petitioner had disclosed his manufacturing activity,

submitted declarations and openly cleared the goods under the *bona fide* belief that the applicable exemption extended to the relevant liability. The subsequent departmental clarification regarding AED cannot retrospectively convert such conduct into deliberate suppression or an intention to evade duty.

31. The show cause notice dated 14.03.1997, insofar as it sought to invoke the extended period under the proviso to Section 11-A(1) of the Central Excise Act, 1944 for the period commencing from 09.04.1994, was therefore beyond the permissible period of limitation and without lawful jurisdiction. The normal limitation prescribed under Section 11-A(1) could not be enlarged in the absence of the statutory ingredients necessary for invoking the proviso.

32. The orders passed by the adjudicating and appellate authorities are consequently vitiated by non-consideration of the material pleas raised by the petitioner, erroneous invocation of the extended period of limitation and failure to appreciate the undisputed departmental knowledge of the petitioner's manufacturing activity. The authorities could not sustain the demand merely by describing the petitioner's failure to obtain registration as wilful suppression when the department had itself accepted the petitioner's declarations and had not required registration or payment of AED during the relevant period.

33. The impugned proceedings and orders are also contrary to the principles laid down by the Hon'ble Supreme Court in the judgments relied upon by the petitioner concerning invocation of the extended period under Section 11-A of the Central Excise Act, particularly where the relevant facts are already within the knowledge of the department. The petitioner accordingly submits that the authorities acted beyond the jurisdiction conferred upon them by the statute in seeking to recover the alleged AED for the period beyond the normal limitation.

34. The petitioner is further aggrieved by the consequential penalty imposed upon him. Once the foundational allegation of suppression,

wilful misstatement or intent to evade duty is not established, the penalty imposed on the petitioner on that basis cannot independently survive.

35. The petitioner has been compelled to face recovery proceedings in respect of the AED and penalty despite having acted upon the exemption granted to his small-scale unit and despite the department's own knowledge of his manufacturing activity. The continued operation and implementation of the impugned orders would cause serious prejudice and irreparable injury to the petitioner.

36. In view of the aforesaid facts and circumstances, the show cause notice dated 14.03.1997 and the consequential adjudication and appellate orders, insofar as they invoke the extended period of limitation and confirm recovery of AED and penalty against the petitioner, are unsustainable in law and liable to be quashed.

37. The petitioner has no other equally efficacious remedy in the facts and circumstances of the case and is, therefore, invoking the extraordinary jurisdiction of this Hon'ble Court under Article 226 of the Constitution of India for appropriate relief against the impugned proceedings and orders.

38. Submission of learned counsel for the petitioner is that the petitioner is a small-scale industrial unit engaged in the manufacture and sale of unbranded *Sada Kimam* and unbranded *Kali Patti Zarda Tobacco* under the name and style of M/s Siraj Tobacco Company, situated at Village Ramabhari, Tehsil Biswan, District Sitapur, since April, 1994. The petitioner's annual sale and clearance during the relevant financial years never exceeded the prescribed limit of Rs.30 lakh and, consequently, the petitioner was entitled to the benefit of exemption from payment of excise duty under Notification No.1 of 1993 dated 28.02.1993 issued by the Government of India in exercise of powers under Section 5-A of the Central Excise Act, 1944 read with the Central Excise Tariff Act, 1985.

39. He submitted that in order to avail the exemption, the petitioner duly submitted declarations under Rule 174 of the Central Excise Rules,

1944 before the competent Central Excise authorities. The petitioner submitted declaration dated 08.04.1994 for the financial year 1994-95, followed by declarations dated 07.04.1995 and 11.04.1996 for the financial years 1995-96 and 1996-97 respectively. Thus, the petitioner had duly disclosed to the department the nature of his manufacturing activity and had claimed exemption in accordance with the applicable notification.

40. He submitted that in view of the aforesaid declarations, the departmental authorities were fully aware of the petitioner's manufacturing and sale activities and also of the fact that the petitioner was claiming the benefit of the small-scale industry exemption. There was, therefore, no concealment, suppression or misrepresentation of any material fact on the part of the petitioner so as to justify invocation of the extended period of limitation under the proviso to Section 11-A(1) of the Central Excise Act, 1944.

41. He submitted that on 09.10.1996, a team of Central Excise officers visited the petitioner's factory and conducted search and seizure proceedings. The officers took stock of the unbranded *Sada Kimam* and unbranded *Kali Patti Zarda* lying in the store room and prepared a panchnama. The bill books and other records relating to the period from 09.04.1994 to 23.09.1997 were also taken into possession by the department. The total clearance during the relevant period was alleged to be Rs.69,06,605/-, although the clearance during any individual financial year did not exceed Rs.30 lakh.

42. He submitted that instead of issuing a single show cause notice covering the entire period, the department issued two separate notices under Section 11-A of the Act. The first show cause notice dated 29.01.1997 related to the period from 04.08.1996 to 27.09.1996, whereas the second show cause notice dated 14.03.1997 related to the period from 09.04.1994 to 26.07.1996. By the latter notice, the petitioner was called upon to show cause as to why Additional Excise Duty (AED) amounting to Rs.6,27,086/- should not be demanded and recovered

under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11-A of the Act, as made applicable to AED by Section 3(3) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, and why penalty should not be imposed under Rule 173-Q of the Central Excise Rules.

43. He submitted that the petitioner duly submitted a detailed reply dated 12.04.1997 to the show cause notice dated 14.03.1997 and specifically contested the proposed demand. The petitioner placed before the department the relevant facts concerning the exemption, the declarations submitted by him and the departmental knowledge of his manufacturing activity.

44. The submission is that subsequently, Instruction No.72/96 dated 24.12.1996 issued by the Commissioner, Central Excise, Kanpur purported to clarify that small-scale units were also liable to pay AED on unbranded chewing tobacco. The said instruction itself demonstrates that there existed an ambiguity regarding the applicability of AED to small-scale units manufacturing unbranded tobacco products. The petitioner submits that such subsequent clarification cannot be relied upon to allege deliberate suppression or wilful evasion on his part for the earlier period.

45. He next submitted that vide corrigendum dated 12.06.1997, the petitioner was further required to show cause as to why penalty equivalent to the duty demanded should not be imposed. The petitioner submitted a detailed reply dated 26.06.1997 and specifically disputed the proposed penalty as well as the very basis for invoking the extended period of limitation.

46. It is also submitted that notwithstanding the aforesaid facts and the petitioner's detailed replies, the Additional Commissioner, Customs and Central Excise, Kanpur passed the impugned order dated 20.10.1997 confirming a demand of Rs.6,27,086/- towards AED under Section 11-A of the Central Excise Act, 1944 read with Rule 9(2) of the Central Excise Rules, 1944 and further imposed an equivalent penalty of Rs.6,27,086/- under Section 11-AC of the Act.

47. It is submitted that the petitioner challenged the aforesaid order by filing a statutory appeal before the Commissioner, Customs and Central Excise, Allahabad. However, the appellate authority, by order dated 18.11.1997, rejected the appeal and affirmed the order dated 20.10.1997. Both the aforesaid orders are under challenge in the present proceedings.

48. The principal submission of learned counsel the petitioner is that the demand itself is contrary to the exemption available to the petitioner under Notification No.1 of 1993 dated 28.02.1993. The petitioner's annual turnover during the relevant financial years remained below the prescribed ceiling of Rs.30 lakh and, therefore, the petitioner was entitled to exemption from payment of excise duty. The department, having accepted and acted upon the declarations furnished by the petitioner, could not subsequently proceed to demand AED by treating the petitioner as liable for duty without considering the statutory exemption available to him.

49. He next submitted that the petitioner had specifically declared his manufacturing activity to the Central Excise authorities and had furnished the requisite declarations for the financial years 1994-95, 1995-96 and 1996-97. Thus, the department had actual knowledge of the nature of the petitioner's products and his claim for exemption. In such circumstances, the essential ingredients necessary for invoking the extended period of limitation under the proviso to Section 11-A(1) were wholly absent.

50. He further submitted that the show cause notice dated 14.03.1997, insofar as it sought to recover duty for the period beyond the normal period of limitation, was without jurisdiction. The department could not invoke the extended period of five years merely on the allegation of non-payment or non-registration, particularly when the petitioner had already disclosed his manufacturing activity and had submitted declarations under Rule 174.

51. He submitted that the petitioner neither made any misstatement nor suppressed any material fact from the department. The departmental

authorities were fully aware that the petitioner was manufacturing and selling unbranded *Kimam* and *Zarda* under sub-heading 2404.40 of the Central Excise Tariff Act, 1985. Consequently, the conditions required for invoking the proviso to Section 11-A(1) were not satisfied.

52. He submitted that mere failure or alleged negligence on the part of the petitioner in obtaining registration specifically in respect of AED, particularly when the petitioner was claiming exemption as a small-scale unit and the department itself had not required him to obtain such registration, could not constitute suppression of facts with intent to evade duty. The extended period of limitation could not, therefore, be invoked against the petitioner.

53. His submission is that the Central Board of Excise and Customs itself issued directions dated 22.04.1997 clarifying that mere non-declaration by an assessee was not sufficient for invoking the larger period of limitation and that a positive misdeclaration was necessary. The said clarification was issued in the context of the principles laid down by the Hon'ble Supreme Court in the case of ***Padmini Products v. Collector of Central Excise, 1989 (43) E.L.T. 195 (S.C.)*** and ***Collector of Central Excise, Hyderabad v. Champhor Drugs and Liniments, 1989 (40) E.L.T. 276 (S.C.)***. Learned counsel for the petitioner submits that the facts of the present case, where the manufacturing activity had been expressly disclosed to the department, stand on an even stronger footing against invocation of the extended period.

54. He further submitted that the department's own subsequent conduct further demonstrates that there was genuine ambiguity regarding the liability of small-scale units to AED on unbranded chewing tobacco. Instruction No.72/96 dated 24.12.1996 was issued specifically to clarify that small-scale units were also liable to pay AED, notwithstanding their exemption from registration and maintenance of accounts. This subsequent clarification cannot retrospectively convert an earlier *bona fide* claim of exemption into deliberate suppression or fraud.

55. He submitted that a large number of small-scale units engaged in manufacture of unbranded *Sada Kimam* and unbranded *Kali Patti Zarda Tobacco* were enjoying exemption from payment of excise duty and were not paying AED. The existence of such practice and the subsequent departmental clarification establish that the legal position was not free from doubt during the relevant period.

56. The submission is that the petitioner's products, namely unbranded *Sada Kimam* and unbranded *Kali Patti Zarda Tobacco*, in the condition in which they were manufactured by the petitioner, were not fit for human consumption until they underwent further processing and refinement. Learned counsel for the petitioner, therefore, submits that such goods, in their existing form, could not be treated as marketable goods capable of being subjected to excise duty. Marketability being an essential requirement for levy of excise duty, the demand raised against the petitioner was otherwise unsustainable.

57. He submitted that the petitioner had not committed any deliberate or wilful violation of the Central Excise Rules. He had duly disclosed his manufacturing activity to the department and had claimed the exemption available to small-scale units. The mere fact that the petitioner had not separately obtained registration in respect of AED, particularly when such AED was not being demanded from similarly situated small-scale units, could not justify the allegation of deliberate evasion.

58. He also submitted that the proviso to Section 11-A(1) of the Act was, therefore, wholly inapplicable to the petitioner. There was neither suppression of facts nor wilful misstatement nor any deliberate attempt to evade payment of duty. Consequently, the normal period of limitation prescribed under Section 11-A(1) alone could apply and the demand covering the period beyond such limitation was liable to be set aside.

59. His submission is that Section 11-AC could not have been invoked for imposing the penalty in the facts of the present case. Apart from the absence of the requisite ingredients of fraud, suppression or wilful misstatement, the provision was not applicable in the manner in which it

has been invoked by the authorities for the relevant period. The penalty equal to the duty demanded was, therefore, legally unsustainable.

60. He submitted that the subsequent issuance of Instruction No.72/96 dated 24.12.1996 is itself indicative of the department's earlier understanding or uncertainty regarding the applicability of AED to small-scale units manufacturing unbranded chewing tobacco. The petitioner, having acted upon the exemption notification and having disclosed his activity, could not be penalised for failing to anticipate a subsequent departmental clarification.

61. His submission is that the Government of India, during the pendency of the dispute concerning levy of AED on unbranded *Sada Kimam* and unbranded manufactured chewing tobacco, issued notification dated 07.05.1997 withdrawing the whole of the duty of excise, including AED, in respect of the products covered thereby. The said notification had direct relevance to the petitioner's case and ought to have been duly considered by the authorities while adjudicating the demand.

62. He also submitted that the impugned order dated 20.10.1997 as well as the appellate order dated 18.11.1997 have failed to properly consider and give effect to the notification dated 07.05.1997. The said notification covered the whole of the duty of excise, including Basic Excise Duty as well as Additional Excise Duty, and consequently had material bearing upon the liability alleged against the petitioner.

63. He also submitted that the impugned orders also failed to properly consider the earlier exemption notification dated 28.02.1993, the petitioner's declarations submitted under Rule 174, the departmental knowledge of the petitioner's manufacturing activity and the subsequent clarification issued by the Central Board of Excise and Customs on 22.04.1997. The orders, therefore, suffer from non-consideration of relevant and material facts.

64. He submitted that the show cause notice dated 14.03.1997, the corrigendum dated 12.06.1997 and the consequential orders dated

20.10.1997 and 18.11.1997 are, thus, vitiated by errors of jurisdiction and are contrary to the statutory scheme governing limitation, exemption and levy of excise duty. The authorities could not enlarge the petitioner's liability by invoking the extended period in the absence of the statutory conditions prescribed therefor.

65. He submits that the appellate authority also failed to independently examine the legality of the demand, the applicability of the exemption notification, the question of limitation, the absence of suppression or wilful misstatement and the effect of the subsequent notification dated 07.05.1997. The appellate order, therefore, merely affirming the adjudication order without properly addressing the petitioner's substantive objections cannot be sustained.

66. He submitted that in view of the petitioner having disclosed his manufacturing activity to the department, having submitted the requisite declarations, having remained within the prescribed turnover limit for the relevant financial years and having acted under a *bona fide* claim of exemption, the demand of AED and the equivalent penalty imposed upon him are unsustainable in law.

67. He lastly submitted that for the aforesaid reasons, the impugned order dated 20.10.1997 passed by the Additional Commissioner, Customs and Central Excise, Kanpur and the appellate order dated 18.11.1997 passed by the Commissioner, Customs and Central Excise, Allahabad are liable to be quashed, and the demand of Rs.6,27,086/- towards AED together with the equivalent penalty imposed upon the petitioner deserves to be set aside. In support of his submissions, he placed reliance upon following judgments:

- a) ***Collector of Central Excise VS. H.M.M. Limited; 1995 Supp. (3) SCC 322.***
- b) ***Cosmic Dye Chemical VS. Collector of Central Excise, Bombay; (1995) 6 SCC 117.***
- c) ***Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay; 1995 Supp. (3) SCC 462.***

d) Tamil Nadu Housing Board Vs. Collector of Central Excise, Madras and Another; 1995 Supp. (1) SCC 50.

68. On the other hand, learned counsel for the respondent submitted that the Order-in-Original No. 01/Addl. Commissioner/MP/KC-II/97 dated 20.10.1997 passed by the Additional Commissioner (Customs), Central Excise, Kanpur-II and the order-in-Appeal No. 55-CE/KNP-II/ACJ/97 dated 18.11.1997 passed by the Commissioner (Appeals), Customs and Central Excise, Allahabad were passed by the competent authorities in exercise of the powers conferred upon them under the Central Excise law. The petitioner was afforded full opportunity to submit his defence, produce evidence and participate in the adjudication proceedings. The impugned orders were, thus, passed in conformity with the principles of natural justice and after consideration of the material available on record.

69. He next submitted that the principal controversy raised by the petitioner proceeds on the erroneous assumption that exemption from Basic Excise Duty automatically carried with it exemption from Additional Excise Duty. The respondent submits that such contention is contrary to the settled legal position. Exemption from Basic Excise Duty does not, by itself, amount to exemption from Special Excise Duty, Additional Excise Duty or Auxiliary Duty unless the relevant exemption notification specifically extends the exemption to such additional levy.

70. He submitted that the expression "duty of excise" in an exemption notification ordinarily refers to Basic Excise Duty and cannot be extended to Additional Excise Duty merely because the source of power for granting exemption is Section 5-A of the Central Excises and Salt Act, 1944.

71. He submitted that in the present case, although the goods manufactured and cleared by the petitioner were entitled to exemption from Basic Excise Duty up to the first clearance value of Rs.30 lakhs, there was no corresponding exemption from Additional Excise Duty during the period in dispute. Additional Excise Duty remained leviable until 06.05.1997 and exemption from such duty up to the first clearance

of Rs.30 lakhs was granted only with effect from 07.05.1997 by Notification No.28/97-CE dated 07.05.1997. Consequently, the goods manufactured and cleared by the petitioner during the relevant period were liable to Additional Excise Duty.

72. His submission is that the contention that the unbranded Sada Kimam and Kali Patti (Zarda) were exempt from all excise liability is misconceived. The exemption from Basic Excise Duty could not be treated as an exemption from Additional Excise Duty in the absence of a specific notification to that effect. The goods in question, being excisable goods covered by the applicable Central Excise Tariff, attracted Additional Excise Duty at the applicable rate.

73. He submitted that the petitioner's contention that the goods were unfit for human consumption or incapable of being marketed is also misconceived. The sale invoices themselves establish that the goods were sold to industrial consumers. The fact that the goods were capable of being sold and were in fact sold establishes their marketability. The manner in which certain purchasers subsequently used the goods does not efface their character as excisable and marketable goods.

74. He next submitted that the petitioner was statutorily required to comply with Rule 174 of the Central Excise Rules, 1944 and obtain registration when the goods manufactured by him became chargeable to Additional Excise Duty. The petitioner, however, failed to obtain the requisite registration despite the fact that no exemption from Additional Excise Duty was available during the relevant period.

75. He also submitted that the declaration submitted by the petitioner on 09.04.1994 cannot be treated as a proper declaration for the purposes of Rule 174. By Notification No.13/92-CE(NT) dated 14.05.1992, the Government had prescribed a standard form for such declaration. The declaration filed by the petitioner did not contain the prescribed undertaking that the assessee would apply for Central Excise registration as soon as the goods mentioned in the schedule became chargeable to duty. Thus, the petitioner cannot rely upon the mere filing of the said

declaration to contend that he had duly complied with the statutory requirements.

76. He submitted that the Department did not receive the declarations allegedly said to have been filed by the petitioner for the years 1995-96 and 1996-97. In particular, no such declarations dated 07.04.1995 or 11.04.1996 were available in the office of the Superintendent, Central Excise Range-I, Sitapur. After the search and seizure operation conducted on 03.10.1996, the petitioner's consultant, Shri H.S. Asthana, submitted a declaration for the year 1996-97 by registered letter dated 14.10.1996, duly signed by the petitioner. The subsequent submission of such declaration, after the search, materially contradicts the petitioner's assertion that a declaration for the same period had already been submitted on 11.04.1996.

77. He submitted that the petitioner did not disclose the alleged earlier declarations during the search and seizure proceedings or before the adjudicating authority and the appellate authority. The plea regarding such declarations was raised subsequently and was rightly treated by the authorities as an afterthought. The Commissioner (Appeals), after examining the record and the submissions of the petitioner, specifically found that the petitioner had failed to produce evidence establishing that the declarations required under Rule 174 had been filed for April 1995 and April 1996.

78. He next submitted that the petitioner not only failed to obtain the requisite registration but also failed to make the necessary declarations and filed an incomplete declaration for 1994-95. These circumstances, taken cumulatively, demonstrate suppression of material facts from the Department. The petitioner was aware, or ought to have been aware, of the statutory requirement relating to Additional Excise Duty and registration, yet failed to comply with the same.

79. He further submitted that the material circumstances relating to the petitioner's conduct were also reflected in the statements dated 03.10.1996 and 03.01.1997 and in the communications of the petitioner's counsel dated 30.09.1996, 14.10.1996 and 15.10.1996. The Department

came to know of the relevant facts in their entirety only upon the search and seizure operation conducted on 03.10.1996. The subsequent conduct of the petitioner, including obtaining registration after the Department's intervention, supports the Department's case that the statutory liability had not been voluntarily disclosed earlier.

80. He submitted that in view of the aforesaid facts, the extended period contemplated under the proviso to Section 11-A(1) of the Central Excise Act, 1944 was rightly invoked. The show cause notice dated 14.03.1997 specifically recorded the circumstances constituting suppression and misstatement of material facts. The demand for the relevant period was therefore not barred by limitation.

81. He submitted that the Commissioner (Appeals), while deciding the appeal on 18.11.1997, independently considered the question of limitation and recorded that the petitioner had not produced evidence establishing filing of the requisite declarations for the years 1995-96 and 1996-97. The appellate authority consequently agreed with the adjudicating authority that registration had not been obtained with the intention of evading payment of duty and upheld invocation of the extended period.

82. He further added that the demand was founded upon the material recovered during the search and seizure operation conducted on 03.10.1996 and the records seized under the relevant Panchnama. It was not founded merely upon the declaration relied upon by the petitioner. The material recovered during the search, read with the other evidence available on record, constituted the basis for determination of the petitioner's liability.

83. He submitted that the show cause notice dated 14.03.1997 was issued in accordance with the statutory provisions and contained the basis for the proposed demand as well as the grounds for invoking the extended period. The demand of Additional Excise Duty and the penal provisions were consequently invoked in accordance with law. The corrigendum to the show cause notice was also issued in accordance with the applicable provisions of the Central Excise law. The provisions

of Section 11-AC, having been introduced by Section 76 of the Finance (No.2) Act, 1996, were applicable in accordance with law at the relevant stage. The petitioner was afforded opportunity to meet the allegations and the material relied upon by the Department.

84. He further added that the adjudicating authority did not mechanically confirm the demand. The order dated 20.10.1997 was passed after considering the case records, the defence reply filed by the petitioner and the submissions made during personal hearing. The petitioner was given adequate opportunity to produce his defence and evidence. The order is, therefore, a reasoned adjudicatory order passed after compliance with the requirements of natural justice. The various judgments and submissions relied upon by the petitioner before the adjudicating authority were duly considered. The petitioner cannot contend that his defence was ignored merely because the authorities did not accept the interpretation advanced by him.

85. He also added that the Commissioner (Appeals), Customs and Central Excise, Allahabad, vide order dated 18.11.1997, considered the petitioner's appeal and upheld the order dated 20.10.1997. The appellate authority specifically considered the issue regarding declarations under Rule 174, the liability to Additional Excise Duty and the invocation of the extended period. The appellate order is, thus, a reasoned and legally sustainable order.

86. He next submitted that the petitioner has misinterpreted Instruction No.72/96 issued by the Central Excise Commissionerate, Kanpur. The said instruction, properly understood, clarified that exemption from Basic Excise Duty under Notification No.1/93 did not by itself extend to Additional Excise Duty. In the absence of a specific exemption from Additional Excise Duty, the liability to such duty continued. The instruction therefore does not support the petitioner's case. Likewise, any reliance placed by the petitioner upon the treatment allegedly accorded to other units is of no assistance. The liability of the petitioner has to be determined on the basis of the facts and evidence relating to his own case. The action, if any, taken in respect of other

assessee cannot determine the legality of the demand raised against the petitioner, particularly when the Department has specifically alleged misdeclaration and suppression in the present case.

87. He further submitted that the petitioner's reliance upon an alleged incident at Lucknow or upon the treatment of other units cannot override the statutory liability arising under the Central Excise law. Each assessment or adjudication has to be examined on its own facts and on the basis of the applicable statutory provisions and evidence. The findings recorded by the adjudicating and appellate authorities are based upon the statutory scheme, the material recovered during search, the petitioner's declarations and the absence of satisfactory evidence establishing compliance with Rule 174. There is no basis for holding that the authorities acted without jurisdiction or in violation of the principles of natural justice.

88. He lastly submitted that in view of the foregoing, the petitioner was liable to pay Additional Excise Duty on the goods manufactured and cleared during the relevant period; exemption from Basic Excise Duty did not extend to Additional Excise Duty; the petitioner failed to comply with the statutory requirements relating to registration and declaration; the extended period under the proviso to Section 11-A(1) was rightly invoked on account of suppression and misstatement of material facts; and the demand confirmed by the adjudicating authority was rightly upheld by the Commissioner (Appeals). The writ petition is, therefore, devoid of merit. The impugned orders dated 20.10.1997 and 18.11.1997 having been passed by competent authorities in accordance with law and after affording adequate opportunity to the petitioner, no ground for interference under Article 226 of the Constitution is made out. The writ petition is accordingly liable to be dismissed. In support of his submissions, he placed reliance upon following judgments:

a) *Dhoot Compack Pvt. Ltd. Vs. Union of India; 1986 SCC Online Bom 490.*

b) *Union of India and others Vs. Modi Rubber Ltd.; (1986) 4 SCC 66.*

89. I have considered the submissions advanced by learned counsel for the parties and perused the material on record as well as law reports cited by learned counsel for the parties.

90. To resolve the controversy involved in the matter, relevant portion of the judgments relied upon by learned counsel for the parties are being quoted below:

Judgments relied upon by learned counsel for the petitioner:

a) *Collector of Central Excise VS. H.M.M. Limited (Supra):*

“2. The assessee contended before the Additional Collector of Central Excise that the show-cause notice was time barred under the main part of Section 11-A since it was issued after the expiry of the period of six months stipulated therein but the Additional Collector sustained the notice on the ground that it was within five years, impliedly holding that the purported action was under the proviso to Section 11-A of the Act. There is no dispute that the show-cause notice cannot be sustained under sub-section (1) of Section 11-A unless the proviso is attracted. Admittedly, it is beyond the period of limitation of six months prescribed under Section 11-A(1) but it is within the extended period of 5 years under the proviso to that sub-section. Now in order to attract the proviso it must be shown that the excise duty escaped payment by reason of fraud, collusion or wilful misstatement or suppression of fact or contravention of any provision of the Act or of the Rules made thereunder with intent to evade payment of duty. In that case the period of six months would stand extended to 5 years as provided by the said proviso. Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or wilful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show-cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practised or that the assessee was guilty of wilful misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act. The Additional Collector while conceding that the notice had been issued after the period of six months prescribed in Section 11-A(1) of the Act had proceeded to observe that there was wilful action of withholding of vital information apparently for evasion of excise duty due on this waste/by-product but counsel for the assessee contended that in the

absence of any such allegation in the show-cause notice the assessee was not put to notice regarding the specific allegation under the proviso to that subsection. The mere non-declaration of the waste/by-product in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of excise duty due on the said product. There could be, counsel contended, bona fide belief on the part of the assessee that the said waste or by-product did not attract excise duty and hence it may not have been included in their classification list. But that per se cannot go to prove that there was the intention to evade payment of duty or that the assessee was guilty of fraud, collusion, misconduct or suppression to attract the proviso to Section 11-A(1) of the Act. There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said subsection are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso. In the instant case that having not been specifically stated the Additional Collector was not justified in inferring (merely because the assessee had failed to make a declaration in regard to waste or by-product) an intention to evade the payment of duty. The Additional Collector did not specifically deal with this contention of the assessee but merely drew the inference that since the classification list did not make any mention in regard to this waste product it could be inferred that the assessee had apparently tried to evade the payment of excise duty.

3. *For the above reasons, we see no merit in this appeal and dismiss the same with no order as to costs."*

b) Cosmic Dye Chemical (Supra):

"5. The main limb of Section 11-A provides limitation of six months. In cases, where the duty is not levied or paid or short-levied or short-paid or erroneously refunded, it can be recovered by the appropriate officer within six months from the relevant date. (The expression "relevant date" is defined in the section itself.) But the said period of six months gets extended to five years where such non-levy, short levy, etc. is "by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules with intent to evade payment of duty..."

6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'wilful' preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful.

7. Now coming to the facts of this case, the appellant's case is that he thought bona fide that he need not include the value of the Rapidogens in his declaration, for the reason that the said product was fully exempt from duty under Notification No. 180/61 dated 23-11-1961. Certain facts are brought to our notice in support of this plea. It is also brought to our notice that on the date of filing of his declaration, two High Courts had taken the view that the goods exempted from duty are not includible within the definition of "excisable goods" as defined in clause (d) of Section 2. No doubt, two other High Courts had taken a contrary view. The appellant's factory is in the State of Maharashtra — and the Bombay High Court had not taken a view one way or the other. In all the circumstances, the appellant says, he was under the bona fide impression that he need not mention the value of the Rapidogens manufactured by him in his declarations."

c) Pushpam Pharmaceuticals Company (Supra):

"3. Law about excisability of exempted goods was settled by this Court in *Wallace Flour Mills Co. Ltd. v. CCE* [(1989) 4 SCC 592 : 1990 SCC (Tax) 10] . Till then conflicting decisions were rendered by different High Courts and Tribunals and it was not settled whether the turnover of assessable and exempted goods were liable to be clubbed for determining liability. Therefore, two questions arise whether the appellant was bound in the state of uncertainty in law to include the turnover of the two items and if it failed to do so then it amounted to suppression of fact and second whether it was the duty of appellant to keep the Department informed about the turnover of the goods which were not liable to any duty. No rule could be pointed out requiring a manufacturer to disclose the turnover of exempted goods. Even assuming it was, the appellant could not be held guilty of suppression when the law itself was not certain.

4. Section 11-A empowers the Department to reopen proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.”

d) Tamil Nadu Housing Board (Supra):

“3. Section 11-A 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 this period to commence proceedings under proviso to the section stands extended to five years if the duty could not be levied or it was short-levied due to fraud, collusion, wilful misstatement or suppression of facts etc. The proviso to Section 11-A reads as under:

“Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder, with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words ‘Central Excise Officer’, the words ‘Collector of Central Excise’, and for the words ‘six months’, the words ‘five years’ were substituted.”

A bare reading of the proviso indicates that it is in nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualised by the proviso by using such strong expression as fraud, collusion etc. and on the other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power. Since the proviso extends the period of limitation from six months to five years it has to be construed strictly. The initial burden is on the department to prove that the situations visualised by the

proviso existed. But once the department is able to bring on record material to show that the appellant was guilty of any of those situations which are visualised by the section, the burden shifts and then applicability of the proviso has to be construed liberally. When the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word 'evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word 'intent'. In other words the assessee must deliberately avoid payment of duty which is payable in accordance with law. In *Padmini Products v. CCE* [(1989) 4 SCC 275 : 1989 SCC (Tax) 616 : (1989) 43 ELT 195] it was held that where there was scope for doubt whether case for duty was made out or not the proviso to Section 11-A of the Act would not be attracted. The appellant is a statutory body. It had taken out licence for concrete as it was being sold to outsiders. No licence was taken out for wood products as according to it it was advised so by the Excise Department itself. It would have been better if the appellant would have examined the officer who was advised not to take licence. But mere non-examination of officer could not give rise to an inference that the appellant was intentionally evading payment of duty. When the appellant was found not to have been making any profit and it had taken out licence for concrete unit then in absence of any other material to prove any deliberate act of the appellant the presumption of reasonable doubt of the appellant cannot be said to have been successfully rebutted. The finding of the Tribunal that there was an intention on the part of the appellant to evade payment of duty, is not based on any material. It was an inference drawn for which there was no basis.

4. In the result, this appeal succeeds and is allowed. The order passed by the Tribunal is set aside and the notice issued by the department for levy of duty and penalty shall stand quashed. There shall be no order as to costs."

Judgments relied upon by learned counsel for the respondent:

a) Dhoot Compack Pvt. Ltd. Vs. Union of India (Supra):

"3. The notification exempts the articles specified in column 2 of the table annexed thereto from the payment of so much of the duty of customs specified in the First Schedule as is in excess of rate of duty of customs mentioned in the corresponding entry in Column 3 of the table. A perusal of the table indicates that Item 5 is High Density Polythelene Moulding Powder and granules and the rate of duty prescribed is 50% ad valorem. Shri Setalvad urges that the benefit contained in the exemption notification extends to additional duty (countervailing duty). It is not possible to accept the submission of the

learned counsel. The notification clearly recites that what is exempted is the duty of customs as is in excess of the rate of duty of customs mentioned in Column 3. The plain reading of the notification makes it clear that the petitioners cannot claim that the exemption under this notification extends to additional duty or countervailing duty. The first submission of the learned counsel must, therefore, fail.”

b) Union of India and others Vs. Modi Rubber Ltd. (Supra):

“6. The first question that arises for consideration on these facts is as to what is the true import of the expression “duty of excise” in the notifications dated August 1, 1974 and March 1, 1981. It is only if this expression is held to include duties of excise leviable not only under the Central Excises and Salt Act, 1944 but also under any other enactments that the question would arise whether the Central Laws (Amendment and Validation) Act, 1982 is constitutionally invalid. We, therefore, asked the learned counsel appearing on behalf of the parties to confine their arguments only to the first question of interpretation of the expression “duty of excise” in the notifications dated August 1, 1974 and March 1, 1981.

12. We accordingly, allow the appeals and dismiss the writ petition. We set aside the judgment of the High Court and hold that under the notifications dated November 8, 1967, August 1, 1974 and March 1, 1981 the respondents in the appeals and the petitioners in the writ petition are entitled to exemption only in respect of the basic duty of excise leviable under the Central Excises and Salt Act, 1944 and are not entitled to claim any exemption in respect of special duty of excise or additional duty of excise or auxiliary duty of excise. The respondents in the appeals and the petitioners in the writ petition will pay the costs of the Union of India.”

91. I have considered the submissions advanced by learned counsel for the parties and have carefully perused the material available on record as well as the judgments relied upon by learned counsel for the respective parties.

92. The controversy essentially relates to the demand of Additional Excise Duty (AED) in respect of unbranded Sada Kimam and unbranded Kali Patti Zarda Tobacco cleared by the petitioner during the period from 09.04.1994 to 26.07.1996, the invocation of the extended period of limitation under the proviso to Section 11-A(1) of the Central Excise Act, 1944 and the consequential levy of penalty. The petitioner has challenged the show cause notice dated 14.03.1997, the adjudication order dated 20.10.1997 and the appellate order dated 18.11.1997.

93. The undisputed factual position, as emerging from the material placed before the Court, is that the petitioner was a small-scale manufacturer engaged in the manufacture and sale of unbranded Sada Kimam and unbranded Kali Patti Zarda Tobacco from April, 1994. The petitioner claims that his annual clearances during the relevant financial years remained below Rs.30 lakhs and that he had accordingly claimed the benefit of Notification No.1 of 1993 dated 28.02.1993. More importantly, for the controversy concerning limitation, the petitioner had submitted a declaration dated 08.04.1994 on 09.04.1994 before the Superintendent, Central Excise, Range-I, Sitapur, disclosing his manufacturing activity. The petitioner further asserts that declarations dated 07.04.1995 and 11.04.1996 were also submitted for the subsequent financial years. Thus, the central question is not whether the Department could, in accordance with law, determine the correct duty liability, but whether, on the facts available before it, the Department was justified in invoking the exceptional extended period of limitation for the entire period commencing from 09.04.1994.

94. The show cause notice dated 14.03.1997 covered the period from 09.04.1994 to 26.07.1996 and sought recovery of AED amounting to Rs.6,27,086/- by invoking the proviso to Section 11-A(1) of the Central Excise Act, 1944. The notice proceeded under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11-A of the Act and Section 3(3) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and also proposed imposition of penalty. The very fact that the demand covered a period substantially beyond the normal period prescribed under Section 11-A makes it incumbent upon the Department to establish the statutory conditions necessary for taking recourse to the proviso.

95. The law in this regard stands clearly explained in the judgment relied upon by learned counsel for the petitioner in the case of **Collector of Central Excise v. H.M.M. Limited (Supra)**. The Hon'ble Supreme Court held that, where the notice is beyond the normal period of limitation, the extended period can be sustained only if the case falls within the specific requirements of the proviso to Section 11-A. The

Court emphasised that fraud, collusion, wilful misstatement, suppression of facts, or contravention of the Act or Rules with intent to evade duty must be established and that the assessee must be put to notice of the particular allegation relied upon by the Department. Mere non-declaration, by itself, cannot automatically establish an intention to evade duty.

96. The principle laid down in the case of *Cosmic Dye Chemical v. Collector of Central Excise, Bombay (Supra)* is equally material. The Hon'ble Supreme Court explained that fraud and collusion carry within them the requisite intent and that, in the case of misstatement or suppression, the statute itself qualifies the same by the expression "wilful". Likewise, contravention of the Act or Rules must be accompanied by an intent to evade payment of duty. Thus, every omission, error, failure to register or failure to disclose cannot, without more, be elevated to the level of wilful suppression contemplated by the proviso to Section 11-A.

97. In the present case, the material relied upon by the petitioner assumes considerable significance. The petitioner did not carry on his manufacturing activity clandestinely. His factory was admittedly functioning from April, 1994 and he had submitted a declaration under Rule 174 on 09.04.1994. The Department was thus aware, at least from that date, of the existence of the manufacturing unit and of the nature of the activity carried on therein. The petitioner also asserts that the subsequent declarations dated 07.04.1995 and 11.04.1996 were duly submitted. Even if the controversy regarding receipt of the latter declarations is kept aside for the moment, the admitted existence of the first declaration and the Department's knowledge of the manufacturing unit assume decisive relevance while examining whether there was deliberate concealment of the manufacturing activity itself.

98. The contention of learned counsel for the respondent that the declaration dated 09.04.1994 was incomplete because it did not contain the prescribed undertaking and that the subsequent declarations were not

available in the departmental record, has been considered. However, the question whether the petitioner had complied with every procedural requirement of Rule 174 is distinct from the question whether he deliberately suppressed material facts with intent to evade payment of duty. A procedural deficiency or omission cannot, by itself, establish the positive and wilful mental element required for invoking the exceptional extended period, particularly where the Department was admittedly aware of the existence of the manufacturing unit and had knowledge of the nature of goods being manufactured. The respondent's contention on Rule 174 may have relevance to determination of statutory compliance, but it does not automatically satisfy the independent requirement of wilful suppression with intent to evade duty.

99. The judgment in the case of *Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay (Supra)* directly supports this conclusion. The Hon'ble Supreme Court held that suppression, in the context in which the expression occurs in the proviso to Section 11-A, cannot mean every omission. It has to be deliberate; in the taxation context, it signifies deliberate non-disclosure of correct information with a view to escape payment of duty. The Court further observed that where facts are known to both parties, the omission by one party to do something which he might have done does not constitute suppression.

100. Applying the aforesaid principle, this Court finds that the Department has not been able to demonstrate, on the material referred to in the impugned orders, that the petitioner deliberately concealed the very existence of his manufacturing activity or deliberately withheld the nature of the goods manufactured by him from the jurisdictional authorities. On the contrary, the petitioner had approached the Central Excise authorities and had disclosed his manufacturing activity. The Department, thereafter, had sufficient opportunity to examine the nature of the goods, the claim of exemption and the applicability of AED. The subsequent discovery of the petitioner's clearances during the search may establish the quantum of clearances, but discovery of the quantum of

clearances is not synonymous with proof of wilful suppression of the underlying manufacturing activity.

101. The respondent has placed considerable emphasis on the search and seizure conducted on 03.10.1996 and has contended that the Department came to know the complete facts only after recovery of the records and bill books during such search. This submission, however, does not satisfactorily answer the fundamental question as to what material fact relating to the existence and nature of the petitioner's manufacturing activity had been deliberately suppressed from the jurisdictional Department since 09.04.1994. The search may have enabled the Department to quantify the clearances and investigate the alleged duty liability, but the statutory requirement for invoking the extended period is not merely discovery of a liability; it is that the non-levy or short-levy occurred by reason of one of the specified acts coupled with the requisite intent.

102. The judgment in the case of *Tamil Nadu Housing Board v. Collector of Central Excise, Madras (Supra)* furnishes further guidance. The Hon'ble Supreme Court held that the proviso to Section 11-A is an exception to the principal rule of limitation and, since it extends the limitation from six months to five years, it has to be construed strictly. The initial burden lies upon the Department to establish the circumstances contemplated by the proviso. Mere failure to pay duty is not equivalent to an intention to evade duty; something more is required. The assessee must have been aware of the liability and must have deliberately avoided payment. The Hon'ble Supreme Court further held that where there was scope for doubt as to whether duty was payable, the extended period would not be attracted in the absence of material establishing a deliberate act.

103. The facts of the present case, when examined in the light of the aforesaid principles, disclose circumstances which negate, rather than establish, a deliberate intention to evade duty. The petitioner was admittedly operating a small-scale unit, had claimed exemption under

the prevailing exemption notification, had made a declaration to the Department and had proceeded on the understanding that the exemption applicable to his unit covered the liability in question. The Department's own subsequent conduct, including the issuance of Instruction No.72/96 dated 24.12.1996 clarifying that small-scale units were also required to pay AED on unbranded chewing tobacco notwithstanding exemption from registration and maintenance of accounts, is a relevant circumstance while examining whether the petitioner's conduct during the earlier period could reasonably be characterised as deliberate suppression.

104. The respondent has contended that Instruction No.72/96 was merely clarificatory and did not create the liability. Even if this contention is accepted for the purpose of determining the substantive liability to AED, it does not follow that the petitioner must necessarily be attributed with a fraudulent or wilful intention to evade duty during the period preceding the clarification. A clarification may explain the Department's understanding of the law, but the existence of such a clarification after the relevant period is also relevant to the question whether the assessee's earlier conduct, in the peculiar factual circumstances of the case, can be regarded as a deliberate suppression designed to evade duty.

105. The same reasoning is reinforced by the departmental communication dated 10.09.1996, which, according to the material placed before the Court, recorded that there was confusion regarding levy of AED on unbranded tobacco and contemplated registration by members pursuant to further directions. This circumstance is inconsistent with the proposition that the legal position was so clear and unambiguous that the petitioner's failure to separately register for AED could, without any further material, be treated as a conscious and deliberate design to evade duty.

106. It is true that the respondent has relied upon the judgments in the case of *Dhoot Compack Pvt. Ltd. v. Union of India (Supra)* and *Union*

of India v. Modi Rubber Ltd (Supra) in support of the proposition that an exemption from basic excise duty does not automatically extend to additional or special duties unless the relevant notification so provides. The principle contained in those judgments cannot be disputed in the abstract. In the case of *Dhoot Compack (Supra)*, the Court examined the language of the particular exemption notification and held that the exemption granted in respect of customs duty could not be extended to additional or countervailing duty when the notification itself did not so provide. Likewise, in the case of *Modi Rubber (Supra)*, the Supreme Court considered the expression "duty of excise" occurring in specific exemption notifications and held that the notifications under consideration granted exemption only from the basic duty of excise and not from special, additional or auxiliary duties.

107. However, the aforesaid judgments are distinguishable from the controversy which is determinative of the present writ petition. Those decisions principally concern the interpretation and scope of the particular exemption notifications and the question whether the exemption from one category of duty can be extended to another category of duty. The present case, while raising an issue concerning the applicability of AED, also squarely raises the independent and distinct question of limitation under Section 11-A and the existence of wilful suppression or intent to evade duty. Even assuming, without finally deciding, that AED was otherwise leviable notwithstanding the benefit of the basic excise duty exemption, the Department was still required to establish the statutory conditions necessary to invoke the extended period of limitation. The judgments in the case of *Dhoot Compack (Supra)* and *Modi Rubber (Supra)* do not dispense with that requirement and, therefore, cannot sustain a demand which is otherwise barred by limitation.

108. In other words, the respondent's authorities may have relevance to the proposition that an exemption from basic excise duty and an exemption from additional excise duty are not necessarily co-extensive. They do not, however, establish that every assessee who claims a basic-

duty exemption and fails to pay AED has thereby committed wilful suppression or contravention with intent to evade duty. The substantive question of liability and the procedural question of limitation are legally distinct. The former cannot be used as a substitute for proof of the latter.

109. This distinction assumes greater significance in the present case because the petitioner is not claiming limitation merely on the ground that he was unaware of the law. His case rests upon a combination of circumstances: disclosure of his manufacturing activity to the Department; filing of a declaration under Rule 174; claim of the small-scale exemption; departmental knowledge of the unit; absence of any demand for AED during the relevant period; departmental practice concerning similarly situated units; subsequent departmental clarification regarding AED; and the petitioner's asserted *bona fide* understanding of the exemption. These circumstances were required to be considered cumulatively before drawing the serious conclusion that the petitioner had deliberately suppressed facts with intent to evade duty.

110. The mere fact that the petitioner subsequently obtained registration or that the Department, upon investigation, came to a different conclusion regarding his liability cannot by itself establish that the petitioner had intentionally withheld material facts from the Department in the earlier period. The respondent has relied upon the subsequent conduct of the petitioner as corroborative of its allegation of suppression. However, subsequent compliance following departmental intervention is not, by itself, proof that the earlier omission was accompanied by the specific intention required under the proviso to Section 11-A.

111. Equally, the dispute regarding whether the declarations dated 07.04.1995 and 11.04.1996 were actually received by the Department cannot be treated as conclusive proof of wilful suppression. The appellate authority proceeded, *inter alia*, on the ground that evidence of filing of the declarations for April, 1995 and April, 1996 had not been produced before it. The petitioner, however, subsequently forwarded

copies of those declarations by registered letter dated 11.12.1997. More importantly, even if the subsequent declarations are left out of consideration altogether, the existence of the petitioner's manufacturing unit and the nature of the activity were not matters wholly concealed from the Department.

112. The Court is also conscious that the Department cannot be expected to accept every claim of exemption merely because an assessee has filed a declaration. The filing of a declaration does not immunise an assessee from statutory liability. Nevertheless, the question before the Court is narrower and is governed by the statutory language of the proviso to Section 11-A. For invoking the extended period, the Department must cross the additional threshold of establishing fraud, collusion, wilful misstatement, suppression of facts or contravention with intent to evade duty. That threshold cannot be diluted merely because the Department ultimately takes a different view of the assessee's entitlement to exemption.

113. The petitioner's plea regarding marketability of the goods also deserves consideration, though in the view taken by this Court it is not necessary to finally adjudicate that issue for disposing of the writ petition. The petitioner asserted that the crude Sada Kimam and Kali Patti Zarda manufactured by him required further processing, refining and finishing before they could be sold as finished consumer products and, therefore, contended that the goods in that condition were not marketable. The respondent, on the other hand, relied upon the sale invoices to contend that the goods were in fact sold to industrial consumers and were consequently marketable.

114. Since the impugned demand for the extended period cannot, for the reasons recorded hereinabove, be sustained for want of the necessary statutory foundation, it is unnecessary for this Court, in exercise of jurisdiction under Article 226 of the Constitution, to conclusively determine the disputed factual question of marketability. The same is accordingly left open and no final opinion is expressed thereon.

115. The respondent has also contended that the impugned orders were passed by competent authorities after affording full opportunity of hearing to the petitioner and that the principles of natural justice were duly complied with. The Court finds no necessity to enter into a broad question of violation of natural justice inasmuch as the writ petition can be decided on the substantive legal issue of limitation and jurisdiction. Compliance with natural justice does not validate an action which is otherwise barred by the statutory period of limitation or founded upon an erroneous invocation of the exceptional proviso to Section 11-A.

114. It is also significant that the petitioner had specifically raised the issue of limitation in his reply dated 12.04.1997 and had asserted that the Department had been aware of his manufacturing activity since 09.04.1994. He reiterated the same objection before the adjudicating authority and thereafter in appeal. Thus, limitation was not an afterthought or a plea introduced for the first time before this Court. It constituted one of the principal defences throughout the proceedings.

115. In view of the aforesaid discussion, this Court is of the considered opinion that the Department failed to establish the necessary nexus between the alleged non-payment of AED and any fraud, collusion, wilful misstatement or deliberate suppression of facts with intent to evade duty. The material relied upon by the Department may demonstrate that the petitioner had not discharged the liability which, according to the Department, became payable; but it does not, on the facts of the present case, establish the additional statutory ingredient necessary for extending the normal period of limitation to five years.

116. The distinction between mere non-payment and intentional evasion has been expressly emphasised by the Supreme Court in the case of ***Tamil Nadu Housing Board (Supra)***. The Court held that when the law requires an intention to evade payment of duty, mere failure to pay duty is insufficient; there must be something more, namely, deliberate avoidance of a duty known to be payable. The Hon'ble Supreme Court further held that where there is scope for reasonable doubt concerning

the applicability of duty and the inference of intent is unsupported by material, the extended period cannot be invoked. The present case, viewed against the admitted departmental knowledge, the exemption claim, the declarations and the subsequent clarification, falls within the principle enunciated therein.

117. Consequently, the show cause notice dated 14.03.1997, insofar as it seeks to invoke the extended period under the proviso to Section 11-A(1) for the period commencing from 09.04.1994, cannot be sustained. Once the extended period is held to be unavailable, the demand covering the period beyond the normal statutory limitation necessarily fails. The foundation of the adjudication order dated 20.10.1997 is thereby materially affected and the appellate order dated 18.11.1997, which affirmed the demand, cannot survive independently.

118. The consequential penalty also cannot be sustained. The penalty was imposed in the backdrop of the allegation that the petitioner had deliberately failed to discharge the duty and had suppressed material facts. Once the allegation of wilful suppression or intent to evade duty is found not established, the very foundation upon which the penal consequence has been imposed disappears. The petitioner had specifically challenged the penalty on the ground that there was no fraud, suppression or wilful misstatement and that the statutory ingredients for imposing an equivalent penalty were absent.

119. The Court is, therefore, unable to accept the submission of learned counsel for the respondent that the mere absence of separate registration, coupled with the Department's subsequent discovery of the clearances, was sufficient to establish deliberate suppression. Such an approach would effectively equate every procedural lapse or every incorrect understanding of tax liability with wilful suppression, which would be contrary to the strict construction required to be placed upon an exceptional provision extending the normal period of limitation.

120. The authorities relied upon by learned counsel for the petitioner, namely *Collector of Central Excise v. H.M.M. Limited (Supra)*, *Cosmic*

Dye Chemical v. Collector of Central Excise, Bombay (Supra), ***Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay (Supra)*** and ***Tamil Nadu Housing Board v. Collector of Central Excise, Madras (Supra)***, are therefore directly attracted to the issue which is determinative of the present controversy. These decisions consistently require something more than mere omission or non-payment before the extraordinary extended period can be invoked. They emphasise the necessity of wilfulness, deliberateness and intent to evade, and further place the initial burden upon the Department to establish the circumstances bringing the case within the proviso.

121. On the other hand, the judgments relied upon by learned counsel for the respondent, namely ***Dhoot Compack Pvt. Ltd. v. Union of India (Supra)*** and ***Union of India v. Modi Rubber Ltd. (Supra)***, operate in a materially different field. Those judgments concern the scope of the exemption granted by particular notifications and establish that exemption from basic excise duty cannot automatically be enlarged to cover additional, special or auxiliary duties unless the notification so provides. They do not decide, nor were they concerned in the manner material here with, the question whether an assessee who has disclosed his manufacturing activity and acted upon a *bona fide* claim of exemption can be subjected to the extended period of limitation in the absence of proof of wilful suppression with intent to evade.

122. Thus, even if the ratio of ***Dhoot Compack (Supra)*** and ***Modi Rubber (Supra)*** is applied to the question of substantive liability and it is assumed that the benefit of Notification No.1 of 1993 did not, by itself, extinguish the liability towards AED, those judgments do not cure the defect of limitation in the present proceedings. A distinction must necessarily be maintained between (i) whether duty was legally leviable; and (ii) whether the Department could recover such duty for the extended period prescribed by the proviso to Section 11-A. The first question cannot dispense with the statutory requirements governing the second.

123. The subsequent Notification No.28/97-CE dated 07.05.1997, relied upon by learned counsel for the petitioner and the departmental clarification dated 24.12.1996 have also been considered. The Court does not find it necessary to determine whether the subsequent notification has retrospective operation so as to extinguish the substantive liability for the earlier period. That question is unnecessary for deciding the present writ petition because the impugned demand, insofar as it covers the extended period, fails on the independent ground that the statutory ingredients for invoking the extended limitation have not been established.

124. The impugned adjudication order dated 20.10.1997, therefore, suffers from an error of law in treating the petitioner's failure to obtain separate registration and the alleged non-production of subsequent declarations as sufficient, by themselves, to establish wilful suppression and intent to evade duty. The material facts relied upon by the petitioner regarding departmental knowledge, disclosure of the manufacturing activity, the exemption claim and the prevailing uncertainty concerning AED were material considerations which required a legally sustainable evaluation before the exceptional limitation provision could be invoked.

125. The appellate order dated 18.11.1997 does not cure this fundamental defect. Although the appellate authority considered the question of declarations and affirmed the invocation of the extended period, the ultimate finding of intention to evade cannot stand when the surrounding circumstances, taken cumulatively, do not furnish adequate material to establish the requisite wilful suppression. The appellate authority could not merely substitute the conclusion of "intention to evade" for the evidentiary foundation which the statute requires.

126. The Court accordingly holds that the Department has failed to discharge the initial burden of establishing the circumstances contemplated by the proviso to Section 11-A(1). The exceptional power of extending the limitation from the normal period to five years is, therefore, unavailable in the facts of the present case. The show cause

notice dated 14.03.1997, to the extent it invokes the extended period for the period commencing from 09.04.1994, was consequently issued beyond the permissible period and cannot furnish a lawful foundation for the demand for the period so barred.

127. Once the extended period is unavailable, the demand of Rs.6,27,086/- towards AED confirmed by the order dated 20.10.1997 and affirmed by the order dated 18.11.1997 cannot be sustained insofar as it relates to the period which had become barred under the normal limitation prescribed by Section 11-A(1). The consequential penalty, being founded upon the same allegation of suppression and intent to evade, must necessarily fall with the principal demand.

128. For all the reasons recorded above, this Court finds that the impugned proceedings cannot be sustained in law. The petitioner had disclosed his manufacturing activity; the Department was aware of the existence and nature of the petitioner's business; the petitioner had claimed the applicable small-scale exemption; there was material indicating uncertainty concerning the liability of small-scale units to AED on unbranded chewing tobacco; and, most importantly, the Department has failed to establish deliberate suppression or wilful misstatement with intent to evade duty. These circumstances, considered cumulatively, render the invocation of the exceptional extended period under Section 11-A(1) legally unsustainable.

129. Accordingly, the writ petition succeeds and is **allowed**.

130. The show cause notice dated 14.03.1997, insofar as it invokes the extended period of limitation under the proviso to Section 11-A(1) of the Central Excise Act, 1944 and seeks recovery of AED for the period barred by limitation, is hereby **quashed**. The Order-in-Original No.01/Addl. Commissioner/MP/KC-II/97 dated 20.10.1997 passed by the Additional Commissioner, Customs and Central Excise, Kanpur-II, confirming the demand of Rs.6,27,086/- towards AED and imposing equivalent penalty, is also **quashed**. Consequently, the Order-in-Appeal dated 18.11.1997 passed by the Commissioner (Appeals), Customs and

Central Excise, Allahabad, affirming the aforesaid demand and penalty, is likewise **quashed**.

131. The respondents are consequently restrained from recovering the aforesaid demand of AED and the consequential penalty from the petitioner pursuant to the impugned show cause notice and the orders dated 20.10.1997 and 18.11.1997. Any recovery, if already made pursuant to the impugned proceedings, shall be dealt with in accordance with law and the consequential relief flowing from quashing of the impugned demand.

132. It is, however, clarified that this Court has principally interfered with the impugned proceedings on the ground of limitation and failure to establish the statutory ingredients necessary for invoking the extended period. No final opinion is being expressed on the broader and disputed question of the substantive applicability of AED to the goods in question or on the issue of marketability, as determination of those questions is unnecessary for disposal of the present writ petition.

133. In view of the aforesaid findings, the petitioner is entitled to the reliefs sought in the writ petition. Consequential relief shall follow.

134. There shall be no order as to costs.

(Irshad Ali,J.)

September 25, 2026

Adarsh K Singh