SUPREME COURT OF INDIA

Commissioner of Customs, Mumbai

Vs.

M.M.K. Jewelers

C.A.No.813-814 of 2004

(Ashok Bhan and Dalveer Bhandari JJ.)

11.03.2008

JUDGMENT

Dalveer Bhandari, J.

1. The questions of law involved in all these appeals are identical, therefore, we propose to dispose of these appeals by this common judgment. For the sake of convenience, the facts of Civil Appeal Nos. 813-814 of 2004 are recapitulated as under:

2. The respondent M/s M.M.K. Jewelers is a unit in Santacruz Electronics Export Processing Zone, engaged in the manufacturing of plain/studded/unstudied gold jeweler for export from directly imported gold or from the gold procured from MMTC in terms of Notification No. 196/87-Cus dated 5.5.1987 which was further amended by Notification No. 155/92-Cus dated 30.3.1992 and Notification No. 177/94-Cus dated 21.10.1994. The said notification, inter alia, permitted graded percentage of gold wastage or loss depending on the value addition achieved, on the jewelers of the description specified therein, and provided that scrap, dust or sweepings may be forwarded to the Government Mint by the importer for conversion into standard gold bars and returned to the said zone in accordance with the procedure specified by the Commissioner of Customs in this regard. Amongst other conditions, the said notification required that the importer shall maintain a proper account of import, consumption and utilization of the goods and of exports made by him. Public Notice No.2/1988 dated 28.7.1988 issued by the Commissioner of Customs, Airport in terms of the above said notification required the units in SEEPZ to maintain registers as per Performa annexed thereto.

3. On 11.11.1995, acting on information that the Gem & Jeweler Units in SEEPZ have been misusing the facility by showing excess manufacturing wastage or loss than permissible under the above mentioned notification, causing shortage in physical stock, claiming it to be lying in the form of dust, the Officers of the Mumbai Customs Preventive Commissioner ate visited the premises of the said unit and verified the records from the period of inception of the unit and took the physical stock of gold followed by detailed investigations which resulted in the detection of a shortage of 6410.885 grams of gold, valued at Rs.28, 72,076.48. The respondent unit was found to have not been maintaining the Wastage Account Register prescribed vide Public Notice No. 2/88 dated 28.7.1988.

4. During the investigation, the respondent unit claimed that the excess manufacturing wastage/loss took place in the production of jewelers and the same was available in the form of dust/slurry and the gold was recoverable by refining the same and the claim of loss made at the time of export was approximation.

5. The EXIM Policy (1992-97) in Para 90 prescribes the admissibility of gold wastage or manufacturing loss as specified in Para 147 of the Hand Book Procedures and the Table-I

thereto whereby the actual wastage or loss is admissible only up to the extent prescribed and as according to the said Customs Notification issued in this behalf.

6. The wastage norms specified in Para 147 of the Hand Book of Procedures in respect of mounting and findings are applicable only in cases where the mountings and findings have been manufactured from imported gold and exported as such and no wastage is admissible if the mountings and findings are imported as they are used as such in jewelers which is then exported in terms of the explanation given below in the Table to clause 10 of Notification No. 177/94 and as clarified by the Ministry of Finance vide letter F.No.305/91/94FTT dated 11.10.1994.

7. No further loss is permitted on the repairs of the imported products as the claim of loss is admitted at the time of an initial export of the products.

8. From the above, it appears that the respondent has failed to maintain the Wastage Account Register for the purpose of monitoring the actual manufacturing wastage or loss but claimed the maximum wastage/loss of claim as mentioned above was made farce and thus they violated the conditions of the aforesaid notification and Public Notice No. 2/88 of 28.7.1988.

9. It also appears that the respondent has failed to export/account for 6410.885 grams of gold valued at Rs.28, 72,076.48 claiming it to be lying in dust and claiming protection under sub-proviso to condition.

10. It, therefore, appears that the aforesaid duty free gold weighing 6410.885 grams and valued at Rs.28, 72,076.48 were neither exported nor were available in the physical stock and thereby violating the conditions of the aforesaid Customs Notification and, consequently, appear to have rendered themselves liable for confiscation under section 111(o) of the Customs Act, 1962.

11. It, therefore, prima facie indicates that the respondent did or omitted to do an act which act or omission rendered the above said duty-free gold weighing 6410.885 grams and valued at Rs.28,72,076.48 liable for confiscation under section 111 of the Customs Act, 1962 or abetted to do an act or omission of such an act and dealt with the said gold which they knew or had reason to believe were liable to confiscation under section 111 of the Customs Act, 1962 as indicated above and thus rendered themselves liable for penal action under clauses (a) and (b) respectively of section 112 of the Customs Act, 1962 and also the mandatory penalty under section 114A of the said Act.

12. Now, therefore, the respondent was called upon to pay Rs.20,82,255.45 as customs duty at the rate of 50% (BCD) + 15% CVD (as applicable on 11.11.1995) on the aforesaid shortage of gold weighing 6410.885 grams valued at Rs.28,72,076.48 as specified above under section 28 of the Customs Act, 1962 and in terms of the Bond executed with the Assistant Commissioner of Customs, SEEPZ and explain in writing to the Commissioner of Customs (Preventive), New Customs House, Ballard Mumbai 400 038, as to why the aforesaid amount should not be recovered and penalty imposed under sections 112(a) and (b) and 114A of the Customs Act, 1962.

13. On behalf of respondent M.M.K. Jewelers, reply to the show cause notice was filed by Mr. A.S. Sunder Rajan, Advocate vide his letter dated 24.2.1998. In the said letter, he contended that the Officers during the stock taking on 11.11.1995 detected a shortage of 6410.885 grams of gold and the gold was reportedly lying in the form of dust and slurry. He also stated that in terms of the general bond, the importer has to maintain a proper accounting

of import, consumption and utilization of the goods and there is no reference to the wastage and that only vide Public Notice 20/96 dated 8.11.1996, the requirement of maintaining of wastage register was prescribed.

14. The respondent submitted that the present show-cause notice dated 13.11.1997 relates to import from 1992-1993 and, therefore, the show-cause notice is time barred. It was also submitted on behalf of the respondent that non-accounting of gold or the wastage thereof does not amount to violation of any provisions of the Customs Act, 1962 or the conditions of Customs Notification No.177/94 issued on 21.10.1994.

15. The respondent submitted that the proprietor of the company in his statement informed that the gold is available in dust and slurry lying in his unit, which is recoverable and the same has been subsequently recovered and, therefore, there is no shortage. In view of this, the invocation of section 111(o) and section 112 is not sustainable. It was also submitted that section 114A of the Customs Act, 1962 was applicable only in respect of a case where duty has not been levied or has been short levied and since the present case relates to accounting of gold, question of levy or penalty does not arise.

16. The respondent stated that the unit had recovered a substantial amount of metal against the shortage of 6410.885 grams alleged in the show-cause notice. Regarding imposition of penalty under section 112 of the Customs Act, 1962, it was stated that the show-cause notice was issued under section 28 of the Customs Act, 1962 for the purpose of recovery of duty and hence provision of section 112 cannot be invoked. It was asserted that the imported gold has been used for the manufacture of jewelers and that the said section can be invoked only in case where imported gold has not been utilized in a manner prescribed in the said notification. The matter of dispute is only regarding the quantum of wastage and recovery of gold there from and, therefore, section 111(o) of the Customs Act, 1962 cannot be invoked and, consequently, section 112(a) or 114A of the Customs Act, 1962 also cannot be invoked. It was further submitted that the show-cause notice is time barred and that since the show-cause notice is issued under section 28 of the Customs Act, 1962 penalty under section 112 cannot be levied.

17. It was also submitted that section 114A of the Customs Act, 1962 has no application to the facts of this case as the said section came into force w.e.f. 28.9.1996 and the show-cause-notice pertains to an earlier period. It was pointed out that section 114A is applicable only in a case where the duty has been short-levied by reason of collusion, willful misstatement or suppression of facts and since there is no such allegation, section 114A cannot be invoked.

18. The Commissioner of Customs in his order dated 27.7.2001, after considering the show-cause-notice and the reply filed by the respondent, observed that on 11.11.1995, the Officers attached to Preventive Commissioner ate of Mumbai Customs conducted the stock taking and verification of records which resulted in detection of shortage of 6410.885 grams of gold, valued at Rs.28,72,076/-. During the investigation, the respondent unit claimed that the said quantity of gold found short was recoverable from the dust/slurry lying in the unit. Shri Mohanlal M. Kedia, Proprietor of the firm in his statement recorded under section 108 of the Customs Act, 1962 stated that the quantity of 6410.885 grams was the loss taken place at the time of manufacturing and the year-wise excess loss from 1990-91 to 1995-96 was ranging between 1.16% to 3.21% whereby the average excess loss for the period was

approximately 1.28%. They also admitted that they did not maintain wastage register. Therefore, by their own admission they had been incurring wastage of gold more than the permissible limit as prescribed in the Notification 196/87-Cus and 177/94-Cus and also vide Para 147 of the Hand Book of Procedures read with Para 90 of the EXIM Policy, 1992-97.

19. The Commissioner of Customs found that there was no dispute regarding computation of shortage. However, the only claim was that so much gold was recoverable by refining the dust/slurry lying in the unit. The respondent took the preliminary objection that the demand of duty under section 28 of the Customs Act, 1962 has been made after six months of the detection of the shortage because the demand has been made to the extent of duty on the goods which were found to have been violated.

20. According to the Commissioner of Customs, the gold imported into the unit was permitted duty free clearance from time to time under Notification No.196/87(Custom) till 21.10.1994 and thereafter under Notification 177/94(Custom). Both these notifications have inherent conditions which are to be complied with by the respondent unit. These conditions inter alia permitted certain quantity of manufacturing loss/wastage on gold and the remaining quantity has to be exported in the form of jewelers. While computing the shortage during the time of stocking this fact has been taken into account and it is not disputed. Therefore, the Commissioner found that the duty on such shortage is recoverable and also such non-fulfillment of the conditions of the Notification and EXIM Policy would render the goods found short, liable for confiscation under section 111(d) and 111(o) of the Customs Act, 1962 and, consequently, the Unit would be liable to penal action under section 112(a) of the Customs Act, 1962 as it was due to their acts of commission and/or omission which gave rise to such shortages rendering the goods found liable for confiscation.

21. The Commissioner of Customs, in his order, has held that to the extent of maintaining of prescribed register, the respondent violated the conditions of the said notifications. The Commissioner also held that the claim of recovery of gold from the slurry/dust cannot be adjusted towards the shortage of gold found during stock checking. The Commissioner held that the shortage of 6410.885 grams of gold was valued at Rs.28,72,076/- and, therefore, the custom duty of Rs.20,82,225/- as demanded in the show cause notice was also payable. The Commissioner of Customs held that the above shortage is violation of the conditions of the Notification No. 196/87 and 177/94-Cus and the EXIM Policy and, therefore, 6410.885 grams of gold valued at Rs.28, 72,076/-was liable to confiscation under sections 111(d) and 111(o) of the Customs Act, 1962. He, however, held that these goods are not available for confiscation; therefore, by virtue of their acts of commission and/or omission, the respondents have rendered the said goods liable for confiscation and rendered themselves liable for penalty under section 112(a) of the Customs Act, 1962. The Commissioner of Customs in his order observed that no cause of collusion, willful misstatement or suppression of facts has been brought out in the show cause notice so as to invoke the provisions of section 114A of the Customs Act, 1962. Therefore, he did not find that it was a fit case for invoking section 114A of the Customs Act, 1962 relating to the penalty.

22. The Commissioner of Customs passed the following order:

> "(a) I confirm the demand of duty of Rs.20, 82,255/- (Rupees Twenty Lakhs Eighty Two Thousand Two Hundred Fifty Five only) under Section 28 of Customs Act, 1962.

(b) Though they said 6410.885 gms. of gold, valued at Rs.28,72,076/- found short is liable for confiscation, since the same is not available for confiscation, while confirming its liability of confiscation under section 111(d) and 111(o) of Customs Act, 1962, I am not ordering confiscation of the said goods.

(c) I impose penalty of Rs.2, 87,000/- (Rupees Two Lakhs Eighty Seven Thousand only) on M/s. M.M.K. Jewelers' (M/s. Jewel Exports Pvt. Ltd.) under Section 112(a) of Customs Act, 1962."

23. The respondent, aggrieved by the said order of the Commissioner of Customs, preferred an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench, Mumbai (for short the Tribunal).

24. The Tribunal decided all these 14 identical appeals by a common judgment dated 19.6.2003. The Tribunal held that the confirmation of demand of duty by the adjudicating authority under Section 28 of the Customs Act, 1962 is wrong in law and facts and the impugned order of the Commissioner of Customs cannot be sustained. The Tribunal also held that the confirmation of duty is barred by limitation. The Tribunal observed regarding clauses (5) and (8) of the notification that one has to be practical that when the jewellery is manufactured out of the raw material and when the gold is converted from primary form to the end product, there may be certain dust which may fly from the place of manufacture or it may even be irrecoverable loss due to the process of manufacture of the final product. It can be invisible. The Tribunal observed that the table of the notification also stated the percentage of gold which could be allowed for wastage. The appeal filed by the respondent was allowed with consequential relief.

25. The appellant Commissioner of Customs, Mumbai, aggrieved by the said judgment of the Tribunal, has preferred this appeal under section 130E (b) of the Customs Act, 1962.

26. Since the respondent has laid serious stress on the question of limitation and imposition of penalty therefore, we deem it appropriate to reproduce the provisions (sections 28 and 114A) dealing with limitation and penalty in the Customs Act, 1962. Sections 28 and 114A are reproduced as under:

27. Notice for payment of duties, interest, etc. (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,

"(a) In the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) In any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the

importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.

Explanation.-Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be."

28. when any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, to whom a notice is served under the proviso to sub-section (1) by the proper officer, may pay duty in full or in part as may be accepted by him, and the interest payable thereon under section 28AB and penalty equal to twenty-five per cent. of the duty specified in the notice or the duty so accepted by such person within thirty days of the receipt of the notice.

29. The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined Provided that if such person has paid the duty in full together with interest and penalty under sub-section (1A), the proceedings in respect of such person and other persons to whom notice is served under sub-section (1) shall, without prejudice to the provisions of sections 135, 135A and 140, be deemed to be conclusive as to the matters stated therein:

"Provided further that, if such person has paid duty in part, interest and penalty under sub-section (1A), the proper officer shall determine the amount of duty or interest not being in excess of the amount partly due from such person."

30. Where any notice has been served on a person under sub-section (1), the proper officer,-

"(i) In case any duty has not been levied or has been short-levied, or the interest has not been paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts, where it is possible to do so, shall determine the amount of such duty or the interest, within a period of one year; and (ii) In any other case, where it is possible to do so, shall determine the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable which has not been paid, part paid or erroneously refunded, within a period of six months, from the date of service of the notice on the person under sub-section (1).(2B) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before service of notice on him under sub-section (1) in respect of the duty or the interest, as the case may be, and inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under sub-section (1) in respect of the duty or the interest so paid: Provided that the proper officer may determine the amount of short-payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" or "six months" as the case may be,

referred to in sub-section (1) shall be counted from the date of receipt of such information of payment. Explanation 1.-Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or the interest was not paid or was part paid or the duty or interest was erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter.

31. Explanation 2.-For the removal of doubts, it is hereby declared that the interest under section 28AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the proper officer, but for this sub-section. (2C) the provisions of sub-section (2B) shall not apply to any case where the duty or the interest had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President. (3) For the purposes of sub-section (1), the expression "relevant date" means,

"(a) In case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods;

(b) In a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;

(c) In a case where duty or interest has been erroneously refunded, the date of refund;

(d) In any other case, the date of payment of duty or interest. 114A. Penalty for short-levy or non-levy of duty in certain cases. Where the duty has not been levied or has not been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (2) of section 28 shall, also be liable to pay a penalty equal to the duty or interest so determined:

32. Provided that where such duty or interest, as the case may be, as determined under sub-section (2) of section 28, and the interest payable thereon under Section 28AB, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five percent of the duty or interest, as the case may be, so determined:

33. Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

34. Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account: Provided also that where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under Section 28AB, and twenty-five per cent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect:

35. Provided also that where any penalty has been levied under this section, no penalty shall be levied under Section 112 or Section 114. Explanation.-For the removal of doubts, it is hereby declared that-

> "(i) The provisions of this section shall also apply to cases in which the order determining the duty or interest under Sub-section (2) of Section 28 relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;
>
> (ii) Any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person."

36. Section 114A can be invoked for imposition of equivalent amount of duty as penalty in cases where the short levy or non-levy has occurred due to mis-declaration or suppression of facts on the part of the assess-importer. Section 114A is a mirror-image of proviso to section 28 of the Customs Act.

37. It has been asserted on behalf of the respondents that in view of the findings of the Commissioner of Customs that there is no suppression or mis-declaration on the part of the respondent, consequently, the duty short levied or not levied has to be demanded under section 28(1) itself and not under the proviso to section 28(1). It was submitted that when there is no suppression or mis-declaration on the part of the respondent, the impugned order confirming the duty beyond the period of six months from the relevant date is not sustainable in law.

38. In the counter affidavit, it is incorporated that assuming that the manufacturing loss is in excess of the specified limits mentioned in Para 10 of Notification No.177/94-Cus, even then no duty can be demanded on the loss of gold when there is no allegation or evidence that the imported gold has been diverted for other purposes, other than for the manufacture and export of gold. The requirement of Notification No. 177/94-Custom stands satisfied even in such cases.

39. The respondent has also dealt with the distinction between recoverable scrap and irrecoverable loss. In the counter affidavit, a table has also been given to demonstrate that there is no shortage as alleged by the appellant.

40. The appellant filed an additional affidavit through Mr. Promod Kumar, Superintendent of Customs (Preventive). It is mentioned in the additional affidavit that the import could be either direct or through the Minerals and Metal Trading Corporation (MMTC). The exemption was subject to certain conditions, and the importer was to execute a general bond undertaking to fulfill the export obligation and the conditions stipulated in the notification. It is mentioned in the additional affidavit that the allowable percentage of loss varied from the type of jewellery and the degree of value addition in the jeweler being manufactured. Thus, there was a graded scale for allowable loss, which was linked to the degree of value addition. It is also incorporated that on 28.7.1988, the Collector of Customs issued Public Notice specifying interim procedure for customs clearance at the Gem and Jeweler Complex, SEEPZ. The Units in the SEEPZ were required to maintain accounts of imported raw materials and capital goods, finished goods, rejected goods etc. The units were also expected to maintain registers annexed to the Public Notice. Copy of the Register Format has been annexed along with the additional affidavit as Annexure A1, A2 and A3.

41. In the additional affidavit, it is incorporated that on 13.11.1997, a show cause-cum-demand notice was issued to the respondent both under section 28 of the Customs Act, 1962 and in the terms of the bond executed by the respondent. It has given the details of how the shortage of gold in the stock was calculated. Column 1 of the table indicates the year. Column 2 indicates the direct imports made in the relevant year and column 3 indicates the procurement from MMTC in that year. Column 4 which is titled Total Weight is the sum of columns 2 and 3 and it denotes the total quantity imported (either directly or through MMTC). Column 5 refers to Actual Weight of Export which is the quantity of goods actually exported. Column 6 denotes the claimed wastage which, as per the Handbook, is a deemed export. The claim wastage figure in the table is taken from the wastage claimed and recorded in the export registers. The unit had been claiming the maximum permissible wastage, whereas it should have been claiming only actual wastage up to the maximum permissible limit. Column 7 is the sum of columns 4 and 5 and it denotes the total weight of export. The difference between the total weight of quantity imported (in column 4) and the total weight of export (in column 7) is the closing balance or the book balance. This is reflected in column 8. If this book balance is found lying with the unit as physical stock, the shortage would be nil. However, if the physical stock is less than the book balance, there will be a corresponding shortage. It may be noted that the calculation of closing balance or book balance is based on records maintained by the respondent itself, as per the prescribed registers. Column 9 represents the physical balance which is found lying with the unit on inspection, to the extent that the figure in column 9 is less than the figure in column 8, there is a shortage and this is reflected in column 10. The shortage in the case of the respondent was 6410.885 grams.

42. It is submitted in the affidavit that the total imports and total exports are calculated (based on records maintained by the respondent). If there is a gap between quantity imported and quantity exported, it is the closing balance or book balance. This is the quantity that the respondent should have as physical stock. To the extent that the actual physical stock is less than the book balance, there is a shortage. This shortage is in excess of the permissible wastage because such wastage was already counted as a deemed export. Duty would have to be paid on such shortage.

43. It must be noted that the shortage detected on inspection cannot be attributed to any particular year. The shortage is calculated based on the difference between total closing balance (for all the years taken collectively since inception of the unit) and physical balance (which is the physical stock lying with the unit at the time of inspection). Thus, a comparison of closing balance and physical balance can only indicate that as of the date of inspection, there had been excess wastage above and beyond the maximum permissible limit. The particular date/year in which the shortage occurred is not determinable.

44. It is submitted that by not maintaining any Wastage Account Registers, the respondent suppressed vital information and thus, there is a clear case for invocation of the extended period of limitation of five years under the proviso to section 28(1) of the Customs Act, 1962. With respect to the relevant date from which the limitation period must commence, it is stated that section 28(3) (a) does not apply. Section 28(3)(a) states that the relevant date means (a) in case where duty is not levied, or interest not charged, the date on which the proper officer makes an order for the clearance of the goods. It is stated that the sub-section

must be interpreted to pre-suppose that duty was livable at the time of clearance. In the case of bonded goods, duty was not payable at the time of clearance and the exemption from duty was contemporaneous with the unit complying with the conditions of the exemption notification. Only on inspection when it was found that the respondent unit had shortage in physical stock, that duty became livable on the shortage amount. As already indicated, the shortage/excessive wastage may have occurred in any of the previous years. The year in which the wastage took place cannot be ascertained nor can the wastage be linked to specific bills of entry which were cleared. Thus, the date of clearance of the goods cannot, in fact, be determined, rendering the application of section 28(3)(a) an impossibility. Sections 28(3) (b) and 28(3)(c) are also inapplicable. Section 28(3) (d) states that the relevant date means (d) in any other case, the date of payment or duty or interest. As per this section, in the present case, since duty is yet to be paid, there would effectively be no limitation period. In any event, in the case of bonded goods, the limitation period would not apply in the same manner as it does to other goods. Both under section 72(1)(d) which deals with warehousing bonds and section 143(3) which deals with import of goods on execution of bond, there is no time limit for the proper officer to make a demand in cases where the conditions of the bond have been violated. In effect, bonded goods stand on a different footing. The show cause-cum-demand notice was made both under section 28 and the terms of the bond. In calculating the limitation period, regard must be taken to the fact that there are bonded goods. Even if the provisions of section 28(3) were to be applied, it is submitted that section 28(3)(d) is the only provision capable of application and as per that sub-section there would be no limitation period in cases where duty is yet to be paid. Various benches of the Tribunal have passed orders holding that in the case of bonded goods, the relevant date is date of payment of duty. Thus, the present show cause-cum-demand notices were not barred by limitation. It may also be noted that the rate of duty applied to the goods and the valuation of the goods is based on prevalent rates as on the date of the inspection. In the alternative, therefore, the date of inspection of stock and detection of shortage may be deemed to be the date of clearance and the limitation period may be taken to mean five years from such date. In this case too, the notices are not barred by limitation.

45. The respondent contended that the shortage amount was actually lying with the unit in the form of dust/scrap/slurry, or had been sent for conversion into gold bars, as per the prescribed procedure. It is submitted that the dust/scrap/ slurry which can be converted into gold bars is included in the allowable wastage and not in addition to it. Wastage is allowed up to permissible limits. If some of this wastage is lying with the unit as dust/scrap/slurry, it may be converted into gold bars and brought back to the unit. But the provision for conversion of dust/scrap/slurry cannot be interpreted in a manner where it allows for wastage beyond permissible limits. The respondents contention that there is a distinction between recoverable and invisible loss, finds no support in the applicable notifications and policies. As the order-in-original has correctly noted, a percentage of gold cannot vanish as such and, therefore, the allowable loss itself contemplates that the wasted amount is lying with the unit in some other form. To the extent that it can be re-converted into gold bars, the notifications make certain enabling provisions. The respondent has sought to exploit this liberty accorded to them by the notification. Further, as stated earlier, the respondent has not maintained the Wastage Account Registers, which must form the basis of any claim of allowable loss. In

such circumstances, the non-maintenance of registers constitutes suppression and creates suspicion about the conduct of the respondent units.

46. In the said affidavit, it is incorporated that the respondent unit has failed to maintain the requisite records documenting wastage. Even if the maximum permissible wastage was allowed to the respondent as a manufacturing loss, there is still a shortage in the physical stock. Duty is payable on this shortage amount. The goods in question are bonded goods and this must be borne in mind while computing the limitation period that the limitation is not applicable to bonded goods in the same manner as it does to other goods.

47. We have heard Mr. Gopal Subramanium, the learned Additional Solicitor General for the appellant and *Mr. V. Lakshmikumaran*, the learned Advocate for the respondent at length and critically analyzed the cases cited by him in support of his case.

48. We deem it appropriate to deal with the preliminary objection regarding limitation raised by the respondent. The respondent has drawn our attention to the findings of the Commissioner of Customs in appeal. The relevant portion of the findings reads as under:

> "No case of collusion, willful mis-statement or suppression of facts has been brought out in the show cause notice."

49. According to the respondent, in this appeal and in all connected appeals stock checking was carried out on 11.11.1995 and the show cause notice was issued after two years i.e. on 13.11.1997 demanding duty and the penalty from the respondent. The respondent submitted that the appellant cannot take benefit of the extended period of limitation under the proviso to section 28 of the Customs Act, 1962 in view of the category findings of the Commissioner of Customs. The respondent further submitted that the order of the Commissioner of Customs had acquired finality because no appeal was preferred against the said order of the Commissioner of Customs. It was further submitted that the Commissioner of Customs has specifically given findings against the appellant and in favor of the respondent regarding applicability of section 114A of the Customs Act, 1962. Those findings are reproduced as under:

50. I find that section 114A of Customs Act, 1962 has been invoked in the show cause notice without giving any proper reasons thereof. No case of collusion, willful mis-statement or suppression of facts has been brought out in the show cause notice so as to invoke the provisions of section 114A of the Customs Act, 1962. Therefore, I do not find that this is a fit case for invoking section 114A of the Customs Act, 1962.

51. The appellant in this appeal and connected appeals cannot invoke the extended period of limitation in view of the Commissioners category findings that no case of collusion, willful misstatement or suppression of facts has been brought out in the show cause notice so as to invoke the provisions of section 114A of the Customs Act, 1962.

52. Penalty under section 114A is imposable only when the demand is confirmed under the proviso to section 28(1) of the Act. In view of the clear findings of the Commissioner that the respondent-assesses are not guilty of suppression of facts or are guilty of collusion or misstatement and, therefore, duty cannot be imposed by invoking the extended period of limitation. When the duty itself cannot be imposed, no order of imposing the penalty under section 114A of the Customs Act can be sustained.

53. Reliance has been placed on *P & B Pharmaceuticals (P) Ltd. v. Collector of Central Excise*[1]. In this case, the question was whether the extended period of limitation could be invoked where the Department has earlier issued show-cause notices in respect of the same subject-matter. It has been held that in such circumstances, it could not be said that there was any willful suppression or misstatement and that, therefore, the extended period under Section 11-A could not be invoked.

54.This case was followed in the subsequent judgment of this court in *ECE Industries Ltd. v. Commissioner of Central Excise, New Delhi*[2] In this case, this court again held that as there is no suppression, penalty cannot be imposed.

55. This court relied on these judgments in the case of *Nizam Sugar Factory v Collector of Central Excise, A.P*[3] In this case, this court again reiterated the legal position and held that when there is no suppression of facts, the department would not be justified in invoking the extended period of limitation.

56. In view of the clear legal position crystallized by a series of judgments that in case where the assesses are not guilty of suppression of facts, collusion or willful misstatement of facts, therefore, the extended period of limitation cannot be invoked under proviso to section 28(1) of the Customs Act, 1962 in the instant appeal and the other connected appeals. Consequently, this appeal and other connected appeals filed by the appellant have to be dismissed being time barred.

57. Since this appeal and other connected appeals are dismissed on the ground of limitation, therefore, we do not deem it necessary to deal with the other submissions made by the parties.

58. This appeal and other connected appeals filed by the appellant are accordingly disposed of. The demand and penalty raised against the respondent in this appeal and against the other respondents in the connected appeals, if any, are dropped. In the facts and circumstances of the case, we direct the parties to bear their own costs.

[1]*(2003) 3 SCC 0599*

[2]*(2004) 13 SCC 0719*

[3]*(2006) 11 SCC 0573*