# Smt. Shahnaz Hussain Vs State of U.P. and Union of India (UOI)

**Court:** Allahabad High Court

**Date of Decision:** Aug. 20, 2007

**Acts Referred:** Central Excises and Salt Act, 1944 â€" Section 11, 11A, 11B, 4, 9
Constitution of India, 1950 â€" Article 136, 226, 227, 32, 323A
Criminal Procedure Code, 1973 (CrPC) â€" Section 244, 245, 246, 482
Penal Code, 1860 (IPC) â€" Section 11AC, 35L, 420

**Citation:** (2008) 227 ELT 61

**Hon'ble Judges:** R.C. Pandey, J; Barkat Ali Zaidi, J; B.S. Chauhan, J

**Bench:** Full Bench

**Final Decision:** Allowed

## Judgement

Barkat Ali Zaidi, J.
A mother and son have challenged by the abovenoted two applications u/s 482 Criminal Procedure Code, the mail

taxability of complaint filed by Deputy Commissioner of Customs and Central Excise, Noida against them in the court of Special Judicial

Magistrate, Meerut. They are being heard together and Sri Gopal Swaroop Chaturvedi Senior Advocate, assisted by Sri Vinay Saran, advocate,

Sri A.K. Nigam, Addl. Solicitor General of India, assisted by Sri S.S. Tiwari and S.K. Mishra, advocates for Central Excise and Sri Pravendra

Kumar, learned Addl. Government Advocate for the State have been heard.

2. M/s Shahnaz Ayurvedic is manufacturing Ayurvedic Medicines under a drug licence for their two Units situated at Okhla New Delhi and Noida.

In the year 1986, M/s Shahnaz Ayurvedic had declared before the Central Excise Department that it was manufacturing Ayurvedic Medicines and

no excise duty was leviable thereon, but the Excise Department had issued a show cause notice dated 2.3.1988 u/s 11A of the Central Excise Act,

1944 (Hereinafter referred to as the "Act") and contended that they were manufacturing cosmetic and not Ayurvedic Medicines. The Addl.

Commissioner, Central Excise upheld the contention of the applicants and the matter was closed vide order dated 29.8.19(sic). Again the

controversy arose and a show cause notice dated 14.7.1988 u/s 11A of the Act was again sent by the Central Excise Department to the

applicants but the Assistant Commissioner, dropped the same by order dated 29.1.1992. In the year 1994-95, again the matter arose when M/s

Shahnaz Ayurvedic filed classification list and price list alongwith his questionare in the department under the provisions of Rule 173-(B) & (C) pi

the Central Excise Rules, 1944 (hereinafter be referred to as the "Rules"), which was finally approved by the Assistant Commissioner, Central

Excise, New Delhi vide order dated 26.8.1994 for its Delhi Unit and by Assistant Commissioner, Noida vide order dated 20.12.1994 for its

Noida Unit.

3. Again the Central Excise Department issued a show cause notice dated 28.7.1997, 1.4.1997 and 1.7.1997 raising the same controversy and

the Commissioner Central Excise (Adjudication) vide order dated 7.8.1998, held that M/s Shahnaz was producing cosmetic and not Ayurvedic

Medicines and by invoking the provisions as contained in Section 11A(i) of the Act, imposed Excise Duty amounting to Rs. 92,39,773/- besides

the interest recoverable u/s 11A & 11B of the Act and also penalty amounting to Rs. 3,68,04,850/-, on the aforenoted amount. The Adjudicating

authority besides the above, also imposed the penalty of Rs. 50 lacs on M/s Shahnaz Ayurvedic and Rs. 25 lacs on M/s Shaherb Cosmetic under

Rule-209 A of the Rules.

4. The order was challenged before the Central Excise Gold Appellate Tribunal (CEGAT in short) but despite the fact that appeals were pending,

the Central Excise Department filed a criminal complaint against the applicants about their two units for having evaded payment of Excise Duly u/s

9 of the Central Excise Art and also u/s 420 I.P.C. in Criminal court at Delhi and another at Meerut.

5. Since the applicants could partly succeed before the CEGAT, they filed Civil Misc. Writ Petition No. No. 820 (T) of 2003, in the Allanabad

High Court and the Division Bench upheld the contention of the applicants and found that it could not be proved that the material produced by

them was cosmetic. They further held that there was no suppression of fact or fraud or under valuation of sale on behalf of the assesses and the

provisions of Section 11A of the Act could not be attracted. It was further held that the period involved had been from March, 1992 to October,

1996 and the show cause notice dated July, 1997 was clearly barred by limitation. The High Court set aside all orders of CEGAT, and the Central

Excise, Commissioner adverse to the assessee applicants.

6. The Excise Department appealed to the Supreme Court against the order of the Allahabad High Court, which was dismissed vide order dated

8.10.2004, a copy whereof is annexed as Annexure3 for ready reference.

7. The Magistrate at Delhi discharged the accused vide order dated 3.1.2005, which is attached herewith as Annexure-A for convenience and

ready reference and which may be treated as part of the judgment. Criminal Case at Meerut is still pending and the applicants have prayed for

termination of those proceedings because of the findings given by the High Court at Allahabad in Writ Petition, referred to above, judgment

whereof is attached with it as Annexure-B for ready reference.

8. Respondent Excise Department still does not concede that he criminal proceedings before the Magistrate at Meerut, are no more maintainable

because of the findings given by the Hon''ble High Court, and they, want to continue whipping a dead horse. It is manifest that after the High Court

has held that there was no suppression or fraud and there was no concealment of facts and evasion of Tax the very foundation, on which the

criminal complaint rested crumbled and collapsed and the criminal complaint against them u/s 420 I.P.C. and Section 9 of the Act, falls to the

ground.

9. An Ingenious argument advanced by the Addl. Solicitor General for the Central Excise was that the High Court has held that for the subsequent

period, the Excise Authorities will be at liberty to make assessment according to law, and therefore, the criminal proceedings at Meerut will

survive. This is a very strange argument which is without any foundation whatsoever. The subsequent assessment has nothing to do with the current

criminal proceedings because the3e criminal proceedings are based on previous assessment and relate to the period for which assessment was

previously made and which has been set aside by the High Court. How could a criminal complaint proceed on the basis of an assumption that in

future also, there shall be an evasion of duty because, this is what, will be the consequence of the argument advanced. The position here is exactly

the same as it existed before the Magistrate at Delhi and the Magistrate did rightly held that the criminal complaint was not maintainable.

10. It was argued by the counsel for Central Excise that the rejection of SLP by the Supreme Court vide Annexure - C does not end the matter

finally because there is a proposal to file a review petition in the Supreme Court, and that is why, the criminal complaint should be allowed to

remain pending. If this argument was to be accepted, no judgment would ever become final. When a judgment has been given, the possibility of a

review petition, being led cannot detract from the finality of the judgment.

11. It may be mentioned on the side lines that it was argued by the counsel for the applicants that the Central Excise Department granted

permission to Deputy Commissioner of Central Excise to file a Criminal Complaint u/s 9 of the Central Excise Act while the complaint filed is not

only u/s 9 of the Central Excise Act b t also u/s 420 I.P.C. This point does not arise for consideration now when it has been held that the complaint

is un-maintainable.

12. One of the argument from the side of the Addl. Solicitor General was that no orders should be passed in proceedings u/s 482 Cr.P.C. and the

applicants should be asked to present an application for discharge u/s 245(2) Cr.P.C. If it is found, as here, that the proceedings are ab initio illegal

and unfounded, then is no need or occasion to ask the applicants to observe the formality of going back and presenting an application for

discharge. If the Count comes to the conclusion that the proceedings initiated against the applicants are illegal, wholly unwarranted and are without

any legal justification, the Court must apply a closure straightaway without turner ado, for stoppage of the abuse of the process of Court.

13. The learned Addl. Solicitor General for the respondent Central Excise has referred to the following cases:

(i) Smt. Nagawwa v. Veeranna Shivalingappt Konjalgi and Ors. 1976 S.C.C. (Cri.) 507.

(ii) State of Bihar Vs. Rajendra Agrawalla, .

(iii) The State of Karnataka Vs. Moin Patel and Others, .

(iv) Kamala Devi Agarwal v. State of West Bengal and Ors. 2001 (43) A.C.C. 1106.

(v) Madan v. State of Uttranchal 2001 (43) A.C.C. 1113.

(vi) Hindustan Petroleum Corporation Ltd. and Ors. v. Sarvesh Berry 2005 (104) F.L.R. 305.

(vii) Ram Shankar Bhattacharjee v. Gauhati High Court 2005 (104) F.L.R. 309.

(viii) K.C. Builders and Another v. ASS II Commissioner of Income Tax 2004 SCC (Crim) 1002.

The decision in these cases depends upon the particular circumstances of each case and cannot be made applicable to all case of this nature.

Reference may be made in this connection to the case of Punjab National Bank Vs. R.L. Vaid and Others, , decided on 20.8.2004, in which the

following observation was made:

There is always peril in treating the word: of a judgment as though they are words in a Legislative enactment and it is to be remembered that

judicial utterances are made in the setting of the facts of a particular case, circumstances flexibility, one additional or different fact may make a

difference between conclusions in two cases. Disposal of cases by merely placing reliance on a decision is not proper. Precedent should be

followed only so as it marks the path of justice, but you must cut out the dead wood and trim of the side branches or else you will find yourself lost

in thickets and branches, said Lord Denning, while speaking in the matter of applying precedent.

14. In the result, aforesaid two petitions are allowed and the impugned proceedings (Criminal Complaint Case No. 2404 of 1999) u/s 9 of Central

Excise and Salt Act and Section 420 I.P.C. before the Special Chief Judicial Magistrate, Meerut shall stand terminated. Opp. Party No. 2, the

Central Excise Department shall be lie Die to pay the litigation cost incurred in the aforesaid two petitions to the applicants, which is quantified as

Rupees thirty thousand.

ORDER

1. By the order, I propose to decide the application o accused filed u/s 245(2) for dropping the proceedings and the discharge of accused,

Learned SPP has filed the reply.

2. Arguments have been heard on the application. The main, argument of learned defence counsel is that being aggrieved with the adjudication

proceedings, accused preferred an appeal before the Customs Excise & Gold Control Appellate Tribunal (CEGAT). The Tribunal dismissed their

appeal against order dated 7.8.1998 and 24.11.1998 passed by the adjudicating authority. They then preferred writ petition bearing No. 820 (1)

of 2003 before the Allahabad, High Court and that the Division Bench of Hon''ble High Court set aside the orders of the Tribunal vide, judgment

dated 29.1.2004. It is further argued that the charge against the accused in the departmental proceedings and in the criminal proceedings are one

and the same. The charges could not be established in departmental proceedings. It is stated that the very basis of the complaint does not exist and

that the prosecution of t! e accused on the same set of facts and evidence cannot be sustained and there is no prospect of cases ending in

conviction. It is also submitted that in a similar case bearing title Central Excise v. Ishaan Research Laboratories Pvt. Ltd. and Ors., the accused;

ersons were discharged by my learned predecessor vide orders dated 4.4.2001.

3. During the course of arguments, it was also brought to the notice of the Court that the SLP filed before the Hon''ble Supreme court against the

orders passed by the Hon''ble High Court has also been dismissed on 8.10.2004. A copy of the order of Hon''ble Supreme has also been placed

on record. I The argument of learned S.P.P. mainly is that a proposal for filling review petition in the Supreme Court and the same is under

consideration in the CEEC, Government of India, North Block, New Delhi and therefore according to learned SPP, the orders of the Hon''ble

Court of Allahabad have not attained finality. In this regard it may be mentioned that admittedly till date, no review petition as been filed and there

is no stay of orders passed by the Commissioner of Central Excise and the order of CEGAT have been quashed by the Hon''ble High Court of

Allahabad, does not amount o acquittal of the accused persons or as a bar to the continuation of the prosecution proceedings before this Court.

4. I have considered the submissions made before the Court and have perused the records of the case. The facts leading to tne filing of the

complaint in brief are that various products manufactured by M/s Shahnaz Ayhurvedics (accused No. 1) were infact cosmetics and toilet

preparations falling under Chapter 33 of the Central Excise Tariff Act, 1985 attracting higher rate of Central Excise Duties while the same were

misdeclared as Ayurvedic Medicine'' and cleared under Chapter 3003.30 of the Tariff Act, 1985 at a lower rate of duty. The products mainly sold

were either skin beatification Creams, cleansers Lotions, Moisturizers or Shampoos and used as consmetics by the buyers. The products for

domestic; consumption of accused No. 1 and is a partner of accused No. 2. Thus, accused Nos. 1 and 3 in connivance with accused No. 2 have

evaded the Central Excise Duty not only by misclassification of but also by gross under valuation of their products. The case was also adjudicated

by the Commissioner of Central Excise who by her order dated 7.8.1998 confirmed the duty den and of Rs. 3,66,04,850/- against accused No.

1. Besides this personal penalty of Rs. 26 lacs was imposed upon accused No. 2 an 1 Rs. 50 lacs against accused No. 3. It has been alleged in

the complaint that accused Nos. 1 to 3 have jointly and severally by their acts and omissions have evaded payment of excise duty amounting to Rs

3,64,04,850/- of their products by mis declaration.

5. Section 244 Cr.P.C. provides that in any warrant case instituted otherwise that on a plice reort, on appearance of accused, the Court shall

proceed to hear the prosecution and take all sue evidence as may be produced in support of the prosecution. Section 245(i) provides that upon

taking all the evidence referred to in Section 244, if the Magistrate finds that no case is made out against the accused which, if un-rebutted, would

warrant his conviction, the Magistrate shall discharge him. However Sub-section (2) of Section 245 embodies an exception to the general rules laid

down in Section 244, by stating that nothing in Section 245 Cr.P.C. shah be deemed to prevent a Magistrate from discharging the accused at any

previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless The present application is

u/s 245(2) Cr.P.C. filed before the conclusion of evidence referred to in Section 244 Cr.P.C. on the ground that allowing the criminal proceedings

to continue and thereby forcing the accused to face the ordeal of trial will be an abuse of the process of law. The application u/s 245(2) Cr.P.C.

for discharge is, therefore, maintainable.

6.In support of his contentions, learned defence counsel has relied upon the following authorities:

Munna Lal Khandelwal and Ors. v. S. Hazara Enforcement Officers and Ors. reported as 2000 (67) ECC 767 (Delhi) (HC); J.P. Gupta v.

Enforcement Directorate, P.S. Rajya v. State of Bihar reported as 1996 S.C.C 897; Ramesh Kumar v. The State reported as 1985 Crl. L.J. 681

; Harbhajan Kaur v. Union of India and Ors. reported as 1993 J.C.C. 447 (Delhi); Jewels of India and Ors. v. State and Anr. reported as XII

1987 (3) Crimes 764 (Delhi) and G.L. Didwania and Another Vs. Income Tax Officer and Another, .

7. In the case of Assistant Collector of Customs and Another Vs. L.R. Malwani and Another, , it has been held by the Hon''ble Supreme court as

Under:

Criminal prosecution of the accused for alleged smuggling is not named merely because proceedings were earlier instituted against him before the

Collector of Customs. Adjudication before a Collector of Customs is not a prosecution, nor the Collector of Costumesa court. Therefore, the rule

of autra tols acquit cannot be invoked. Neither the issue estoppel rule is but a facet of the doctrine of autre tols acquit. Even through the accused

was given benefit of doubt in earlier proceedings the decision of the Collector of Customs does not amount to a verdict of acquittal in favour of

accused so as to attract the rule of issue estoppel.

8. The question for consideration before the Hon''ble Supreme Court in the aforesaid case was as to whether the finding of Collector of Customs

operate as issue estoppel but it was held teat since the adjudication before the Collector of Customs is not a prosecution nor Collector of Customs

a court, therefore, issue estoppel rule is not attracted. The facts of the present case are distinguishable in as much as, the Commissioner of Central

Excise (Adjudication) had confirmed the duty demand of Rs. 3,68,04,850/- vide orders dated 7.8.1998 CEGAT dismissed the appeal against the

order dated 7.8.1998 but in Civil Writ Petition No. 820 (T) of 2003, it was held by the Hon''ble High Court of Allahabad that the provisions of

Section 11(a) of the Central Excise Tarrif Act, 1985 are not attracted. The order dated 7.8.1998 was set aside. The SLP against the orders

passed against Allahabad High Court was dismissed by the Hon''ble Supreme Court. The present case is distinguishable from the case of L.R.

Melwani, in as much as, the finding has been returned by Hon''ble High Court of Allahabad and not by Commissioner of Central Excise or

CEGAT. The law laid down by the Hon''ble Supreme Court in the case of L.R. Mrlwani is, therefore, not applicable in the facts and circumstances

of the present case. The charge against the accused in the departmental proceedings and the criminal proceedings is the same. The order passed in

the departmental proceedings which is the ba.Ms of the present complaint has been set aside by the orders passed by the Hon"ble High Court.

Therefore, the very basis of the complaint does not exist. The application u/s 246(2) Cr.P.C. is, therefore, allowed. The accused is discharged.

Bail bond of accused is cancelled. Surety is discharged. File be consigned to Record Room.

B.S. Chauhan, J.
This writ petition has been filed for quashing the order dated 14.05.2003 (Annex. 10) passed by the Customs Excise

and Gold (Control) Appellate Tribunal, hereinafter called the ""CEGAT", by which the Tribunal has dismissed the appeal against the orders dated

07.08.1998 and 24.11.1998 passed by the adjudicating authority.

2. Facts and circumstances giving rise to this case are that the petitioner No. 1 claims that it manufactures Ayurvedic medicines since 1986 after

obtaining the licence under the Drug and Cosmetics Act, 1940 hereinafter called "the Act 1940" and the Rules framed thereunder, hereinafter

called "the Rules". In September, 1987, the officers of the Central Excise department conducted investigation in the process of manufacturing of

the products by the petitioner No. 1 as well as nature thereof. In 1988, dispute arose as to whether the products manufactured by petitioner No. 1

could fall within the category of Ayurvedic medicines or were in fact Cosmetics used for the care and condition of the skin and hair, and were

liable to duty under the Central Excise Tariff Act, 1985, hereinafter called the "Act 1985". For that purpose, the provisions of Section 11A of the

Central Excise Act, 1944, hereinafter called "the Act 1944" were invoked and the matter was also examined as to whether the petitioner No. 1

had suppressed/concealed required informations/materials in lat regard. After completing the inquiry required under the law, the Revenue accepted

the plea of the petitioner No. 1 vide order dated 29.08.1989 passed by the Additional Commissioner, holding that the said products were

Ayurvedic medicines and not Cosmetics. It was further held that as no material facts were suppressed by the assessee, provisions of Section 11A

of the Act 1944 could not be invoked and proceedings initiated vide show cause notice dated 07.03.1988 were dropped. Assessee was allowed

clearance of its products under Chapter 30 of the Tariff Act 1985, as Ayurvedic medicines. Again, the same controversy arose and the

proceedings initiated by the show cause notice dated 14.07.1988, were dropped vide order dated 29.01.1992 by the Assistant Commissioner

holding that products of the assessee were Ayurvedic medicines and could not be classified as Cosmetics. In 1994, the Classification Lists and

Price List along with questionnaire were furnished by the assessee, as required under lie provisions of Rule 173(B) and (C) of the Central Excise

Rules, 1944, framed under the Act 1944, hereinafter called the ""Rules 1944"". Same were provisionally approved vide order dated 26.08.1994 by

the Assistant Commissioner, Central Excise, MOD-II, New Delhi and finally vide order dated 29.09.1994. The products stood classified under

Chapter 30 and not Chapter 33 of the Tariff Act 1985, holding the same to be Ayurvedic medicines and not Cosmetics. Similar remained the case

regarding the other establishments in NOIDA, wherein the classification was approved under Chapter 30 of the Tariff Act 1985 by the Assistant

Commissioner provisionally vide order dated 01.09.1994 and finally vide order dated 02.12.1994. Again, assessee was served with show cause

notices dated 28.02.1997; 01.04.1997; and 01.07.1997 regarding the same controversy and the authority, after adjudicating the matter, i.e.

Commissioner of Central Excise (Adjudication), on 07.08.1998 passed the following order:

(1) As the facts establish that duty was evaded by willful mis-statement and suppression of facts I upheld invokation of the extended period of

limitation in terms of the proviso to Section 11A(1) of the Central Excise Act, 1944 and confirm the demand of duty amounting to Rs. 3,68,04,85u

(Rupees Three crores, sixty eight lakhs, four thousand, eight hundred and fifty only) on M/s. Shahnaz Ayurvedas, Okhla Industrial Area, New

Delhi & duty demands of Rs. 4,80,84,599 (Rupees Four crores, eighty lakhs, eighty four thousand, five hundred and ninety nine only) and Rs.

92,39,773 (Rupees Ninety two lakhs, thirty nine thousand. seven hundred and seventy three only) on M/s Shahnaz Ayurvedas, Noida. I also hold

that interest is recoverable from them u/s 11AB of the Central Excise Act, 1944.

(2) I impose penalties equivalent to the duty determined u/s 11A(2), as indicated above, amounting to Rs. 3,68,04,850 (Rupees Three crores,

sixty eight lakhs, four thousand, eight hundred and fifty only) on M/s Shahnaz Ayurvedics, Okhla Industrial Area, New Delhi and Rs. 4,80,84,599

(Rupees Four crores, eighty lakhs, eighty four thousand five hundred and ninety nine only) and Rs. 92,39,773 (Rupees Ninety two lakhs; thirty

nine thousand, seven hundred and seventy three only) on M/s. Shahnaz Ayurvedics, Noida under the provisions of Section 11AC of the Central

Excise Act, 1944.

(3) I impose a penalty of Rs. 25 lakhs (Rupees Twenty five lakhs only) on M/s. Shaherb. 2Cosmetics, under Rule 209A of the Central Excise

Rules, 1944.

(4) I impose a penalty of Rs. 50 lakhs (Rupees Fifty lakhs only) on Ms. Shahnaz Husain under Rule 209A of the Central Excise Rules, 1944.

3. Being aggrieved, assessee preferred appeals No. E/2787, 2925, 2926, 2927 and 2928 of 1998-NB-(C) before the CEGAT, which have been

disposed vide impugned judgment and order dated 14.05.2003 (Annex. 10). By the said impugned order, the learned Tribunal set aside the order

of interest only so far as the first clause is concerned. The second clause was modified to the extent that it was partly set aside imposing penalty on

petitioner No. 2 under Rule 209-A of Rules 1944 as having dealt with the excisable goods and as the same was not liable to confiscation. No

interference was made with Clause (3) of the order. However, the 4th clause of the order imposing the penalty of Rs. 50,00,000/- on assessee

under Rule 209-A of the Rules 1944 was set aside. By the same impugned order, 8 cross-appeals of the Revenue, on the ground that Assessee

was liable to pay the excise duty on the price of the products after including the excise duty, sales tax and other taxes etc, were dismissed. Hence

this petition.

4. Before proceeding with the merit of the case, it may be. pertinent to mention here that Shri B.N. Singh, learned Standing Counsel along with

Shri S.K. Misra, Advocate for the Revenue has raised an objection regarding maintainability of the writ petition contending that as the remedy of

appeal is provided under the provisions of Section 35L of the Act 1944 either against the order of classification or valuation, before the Hon''ble

Apex Court, and as in the instant case, both the issues are involved, this Court has no competence to deal with the case, and it should be dismissed

as not maintainable.

5. On the contrary, Shri Rakesh Dwivedi, learned Senior Counsel with Mrs. Gitanjali Mohan and Shri W.H. Khan, Advocates appearing for the

Assessee has submitted that the Revenue did not raise the preliminary objection on the first date of hearing, i.e. 10.07.2003 when the matter was

heard for admission. Preliminary objection should have been taken at the initial stage. It is being raised after the arguments on behalf of the

Assessee on merit stood concluded, after hearing on several dates. The statutory appeal before the Hon''ble Supreme Court cannot be a bar for

this Court to exercise the power of judicial review under Articles 226/227 of the Constitution and this case has to be considered entirely from a

different angle, as it does not fall within the category of cases where writ is not entertained for the reason that the petitioner has not exhausted the

statutory remedies of appeal or revision etc. The power of judicial review being a basic feature of the Constitution, cannot be taken away by the

Legislature by providing the remedy of appeal before the Hon''bie Supreme Court. The petition cannot be rejected on this sole ground.

6. We have considered the rival submissions made by the learned Counsel for the parties and perused the record.

7. The Constitution Benches of the Hon"bie Supreme Court, in K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., ;

Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, ; Union of India (UOI) Vs. T.R. Varma, ; State of U.P. and Ors. v. Mohammad

Nooh AIR 1958 SC 86; and K.S. Venkataraman and Co. Vs. State of Madras, , held that Article 226 of the Constitution confers on all the High

Courts a very wide power in he matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has

always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The

Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural

justice or procedure required for decision could not be adopted.

8. Another Constitution Bench of the Hon"bie Supreme Court, in State of Madhya Pradesh Vs. Bhailal Bhai and Others, , held that the remedy

provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence

legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been

reiterated in N.T. Veluswami Thevar Vs. G. Raja Nainar and Others, ; Municipal Council, Khurai and Another Vs. Kamal Kumar and Another, ;

Siliguri Municipality and Others Vs. Amalendu Das and Others, ; S.T. Muthusami Vs. K. Natarajan and Others, ; Rajasthan State Road Transport

Corporation and Another Vs. Krishna Kant and Others, ; Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, ; A.

Venkatasubbiah Naidu Vs. S. Challappan and Others, ; and L.L. Sudhakar Reddy and Others Vs. State of A.P. and Others, ; Shri Sant Sadguru

Janardan Swami (Moingirid Maharaj) Sahakari Dugdha Utpadak Sanstha and Another Vs. State of Maharashtra and Others, ; Pratap Singh Vs.

State of Haryana and Others and Shri Bhajan Lal and Others, ; and G.K.N. Driveshafts (India) Ltd. v. Income Tax Officer and Ors. (2003) 1

SCC 72.

9. In Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , the Hon"ble Supreme Court held that the rule of exclusion of writ

jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of

the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights; where there is

failure of principle of natural justice or where the orders c, proceedings are wholly without jurisdiction or the vires of an Act is challenged.

10. In Veerappa Pillai Vs. Raman and Raman Ltd. and Others, ; Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop

India Ltd. and Others, ; Shri Ramendra Kishore Biswas Vs. The State of Tripura and Others, ; Shivgonda Anna Patil and Others Vs. State of

Maharashtra and Others, ; C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, ; Titaghur Paper Mills Co.

Ltd. and Another Vs. State of Orissa and Others, ; H.B. Gandhi v. Gopinath & Sons 1992 (Suppl.) 2 SCC 312; Whirlpool Corporation Vs.

Registrar of Trade Marks, Mumbai and Others, ; Tin Plate Co. of India Ltd. Vs. State of Bihar and Others, ; Sheela Devi Vs. Jaspal Singh, ; and

Punjab National Bank Vs. O.C. Krishnan and Others, , the Hon''ble Apex court held that where hierarchy of appeals is provided by the statute,

party must exhaust the statutory remedies before resorting to writ jurisdiction.

11. Thus, the law can be summarised that rule of exclusion of the writ jurisdiction is not a law. Discretion should be exercised by the writ Court

considering the facts and circumstances involved in each case. But where there has been violation of the principle of natural justice or failure of any

rule of fundament procedural or Tribunal places erroneous interpretation on the statutory provision, or exceeds its jurisdiction, writ petition can be

entertained, even if the Statute provides for appeal/revision.

12. A Constitution Bench of the Hon''ble Supreme Court in L. Chandra Kumar v. Union of India 1997 SC 1125, held that all decisions of the

Tribunals whether created under Article 323A or 323B of the Constitution. are subject to the High Court writ jurisdiction under Articles 226/227

of the Constitution and the remedy provided in the parent institute by way of special leave to Appeal under Article 136 of the Constitution is no

bar. After considering a large number of its earlier judgments including His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, ;

and Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others, , the Apex Court came to the conclusion that theory of alternative

institutional mechanism established in S.P. Sampath Kumar and Others Vs. Union of India (UOI) and Others, , was not in accordance with the

proposition of law laid down in Keshwanand Bharti''s case (supra). The Court held as under:

We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court Under

Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the

power of High Courts and the Supreme Court to test the Constitutional validity of the legislations can never be ousted or excluded We also hold

that the power vested in the High Courts to exercise judicial superintendence over the decisions of all the Courts and Tribunals within their

respective jurisdiction, is also a part of the basic structure of the Constitution. This is because of a situation where the High Courts are divested of a

other judicial functions apart from that Constitutional interpretation, is equally to be avoided.... On the other hand, to hold that all such decisions

will be subject to the decision of the High Court under Article 226/227 of the Constitution before a Division Bench of the High Court within whose

territorial jurisdiction, the Tribunal concerned falls, will serve two purposes. While saving the power of judicial review of legislative action vested in

the High Courts under Article 226/227 of the Constitution, It will ensured that frivolous claims are filtered out through the process of adjudication

of the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of the use to it in finally deciding the

matter.... We hold that all decisions of Tribunals, whether created pursuant to Article 323A or 323B, will be subject to High Courts writ

jurisdiction under Article 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction, the particular

Tribunal falls.

13. Similar view has been reiterated in R.K. Jain Vs. Union of India and Others, .

14. In Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes, , the Constitution Bench of the Hon''ble Supreme Court held that

the jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any

restrictions except the territorial restrictions, which are expressly provided under the Constitution. But the exercise of the jurisdiction is

discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be

exercised subject to certain self-imposed limitations.

15. Similar view has been reiterated in State of Karnataka Vs. Vishwabarathi House Building Coop. Society and Others, by the Hon''ble Supreme

Court observing that a Court may entertain a petition notwithstanding concurrent jurisdiction of the other forum/Court for the reason that ""the

power of judicial review of the High Court, which is a basic feature of the Constitution, has not been nor could be taken away"".

16. In State of Orissa and Others Vs. Gokulananda Jena, , the Hon''ble Apex Court held that the power of the High Court to entertain writ petition

is an original power and that power of judicial review is subject to rules of exclusion such as alternative remedy or exhaustion of remedy.

17. In T.K. Rangarajan v. Government of Tamil Nadu and Ors. 2003 AIR SCW 3807, the Hon''ble Supreme Court held that ordinarily the writ

Court should not entertain any matter where statutory remedies have not been exhausted but is empowered to exercise extraordinary jurisdiction to

meet unprecedented extraordinary situation, having no parallel and the Court held t. at where the State Government has dismissed two lakhs

employees for going on strike, the situation was very very exceptional. There was no justifiable reason for the High Court not to entertain the

petitions on the ground of alternative remedy provided under the Statute.

18. Preliminary objection in this regard was accepted by the Karnataka High Court in M/s. Premier Irrigation Equipments Limited, Bangalore Vs.

Union of India and Others, ; Bombay High Court in Colour-chem. Ltd. Vs. Union Of India, ; and Delhi High Court in Shalimar Rubber Industries

Vs. Union of India, ; & Perfect Electric Concern Pvt. Ltd. Vs. Assistant Collector/Commissioner, Central Excise, .

19. However, the Division Bench of the Madhya Pradesh High Court in Neo Sacks Limited Vs. CEGAT, , entertained the petition and rejected

the same objection observing as under:

Coming to respondent''s plea of alternative statutory remedy, it deserves to be rejected on the very threshold. It is well settled that rule of

exhaustion of available statutory remedy is only a rule of policy. It neither bars nor prohibits jurisdiction of the Court and the entertaining c

otherwise of a petition falls squarely within the discretion of the Court. It is also well recognized that where the Tribunal or a Court acts outside its

jurisdiction or in excess of it or under a law which is ultra vires or places an erroneous interpretation on a statute or conducts proceedings in a

manner contrary to rules of natural justice and accepted rules of procedure, the plea of alternative statutory remedy becomes irrelevant....

Moreover the remedy of appeal provided in Section 35L is restrictive in nature and character and thus could not be treated as efficacious to oust

the exercise of the writ jurisdiction.

20. Appeal u/s 35L of the Act 1944 is required to be considered in a different way than any other statutory appeal. In other cases, if a party is

relegated to appellate/revisional forum, the party after exhausting the said statutory remedy, may again approach the writ Court challenging the

order of the said forum. Such a course is not permissible in case of appeal u/s 35L of the Act 1944.

21. The power of judicial review is basic feature of the Constitution and even the Parliament cannot take it away by amending the Constitution.

Thus, it becomes difficult to assume that such a jurisdiction can be ousted merely by amending the statute without having any express provision for

ouster of the said remedy, even while providing the statutory remedy of appeal directly before the Hon''ble Apex Court. Accepting the contention

of the Revenue that under no circumstances writ can be entertained in view of t se provisions of Section 35L of the Act 1944, the provisions of

Section 35L have to be read rewriting the same adding the words ""and no writ under Article 226 of the Constitution would be entertained.

Adding or substracting of any word or rewriting of the provisions could itself amount to an amendment o the Act, which is not permissible. Vide

Union of India (UOI) Vs. Mohindra Supply Company, ; Madanlal Fakirchand Dudhediya Vs. Shree Changdeo Sugar Mills Ltd., ; Mangilal Vs.

Suganchand Rathi, ; Union of India v. Sankal Chand Himmat Lal Seth AIR 1977 SC 328; Commissioner of Sales Tax, U.P. Vs. Auriaya

Chamber of Commerce, Allahabad, ; P.K. Unni Vs. Nirmala Industries and others [OVERRULED], ; und Union of India v. Deokinandan

Agarwal AIR 1992 SC 96.

22. Be that as it may, the Hon''ble Apex Court in West Bengal Govt. Employees (Food and Supplies) Co-operative Housing Society Ltd. and

Others and The State of West Bengal and Others Vs. Smt. Sulekha Pal (Dey) and Others, , while dealing with the same provisions, has

categorically held that the writ jurisdiction is not barred in all the circumstances. Thus, we are of the view that the writ petition can be entertained

against the impugned judgment and order. The petition was entertained at the initial stage after hearing the learned Counsel for the Revenue, and

interim relief had been granted after having deliberations at length and the counsel for Revenue did not even raise the plea in this regard at that time.

It is being raised at a belated stage, the san e is not worth acceptance and accordingly rejected.

23. Shri Rakesh Dwivedi, learned Senior Counsel appealing for the petitioners has submitted that as there has been no intention of the petitioner to

evade duty and the assessee had always been furnishing full information regarding classification, valuation also disclosing the relation with petitioner

No. 2, there was no occasion for the Adjudicating Authority to pass he impugned orders. More so, in such an eventuality, the proviso of Section

11A of the Act 1944 could not be attracted. The Adjudicating Authority as well as the Tribunal failed to appreciate the material on record

particularly the Price List, Questionnaires, Invoices, Returns and Literatures submitted by the assessee had not been taken into account at all.

Petitioner No. 2 had been the bulk purchaser of the products and less than 2 percent of the products had been sold in the open market including

Hotels and Airlines and the said small quantity could not be the decisive factor for the purpose of classification. Packing material and labels affixed

on that had clearly shown that they were Ayurvedic medicaments. They were having effect of curing and not only caring of the human body. None

of the authorities below ever tried to find out by chemical analysis as what was the contents of the products and which constituent of the product

had been having the dominant character. The reports of experts submitted by the petitioner were brushed aside without giving any reason, giving a

hostile treatment to the petitioner while in cases of other Assessees, reports of experts had been given due consideration/weightage. Findings of

fact recorded by the Tribunal as well as by the Adjudicating Authority are perverse, being based on no evidence rather contrary to the evidence on

record. Petitioner had always been disclosing all the information, which had been accepted by the revenue throughout and orders impugned could

not be passed merely because of the change of the opinion. Therefore, the revenue erred grossly applying the proviso of Section 11A of the Act

1944. The case of the petitioners was squarely covered by the Chapter 30 and not 33 of the Tariff Act 1985. Hence, the orders are liable to be

set aside.

24. Shri B.N. Singh, learned Counsel appearing for the revenue has vehemently opposed the averments made on behalf of the assesee contending

that while dealing with the case under fiscal statutes, the Court has to apply the rule of literal interpretation, as equity, personal hardship to the

assessee are not the grounds to be taken into consideration at all. Assessment for each year is an independent act and assessee cannot ask the

revenue not to make the assessment in accordance with law, if earlier orders had been passed in favour of the assessee wrongfully. The findings of

fact recorded by the statutory authorities that the assessee had evaded the tax, is enough to attract the proviso to Section 11A of the Act 1944.

More so, the entire case of the petitioner is not covered by the said proviso and a short period s covered by the main clause. The Court should not

interfere with the well reasoned orders passed by the statutory authorities which have categorically held that case of the petitioners falls under

Chapter 33 and not 30 of the Act 1985. The case does not present any special feature warranting judicial review of the findings of fact recorded

by the statutory authorities. Petition is liable to be dismissed.

25. We have considered the rival submissions made by the learned Counsel for the parties and perused the record.

26. It is settled legal proposition that while interpreting a fiscal statute, the Court should apply the rule of literal interpretation. In Mathuram

Agrawal Vs. State of Madhya Pradesh, , the Hon''ble Apex Court observed that equally, impermissible is an interpretation which does not follow

from the plain and unambiguous language of the Statute.

27. In M/s. Saraswati Sugar Mills Vs. Haryana State Board and others, , the Hon"ble Supreme Court held that there con be no room for any

intentment, nor is there equity about a tax. Nothing is to be read in and nothing can be implied. While interpreting the taxing statute, one has to look

fairly at the language used therein. The fiscal statute must, therefore, be strictly construed in order to find out the extent of liability fastened on a

particular industry and while doing so, the fiscal statute must be read according to its natural construction of words. While deciding the said case,

the Apex Court placed reliance upon large number of its earlier judgments, particularly, in Gursahai Saigal Vs. Commissioner of Income Tax,

Punjab, ; A.V. Fernandez Vs. The State of Kerala, ; Commissioner of Income Tax, Madras Vs. V. Mr. P. Firm, Muar, , and Ahmedabad Urban

Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others, .

28. In The Martand Dairy and Farm Vs. The Union of India (UOI) and Others, , the Hon"ble Apex Court observed that:

Law is not always logic and taxation considerations may stem from administrative experience and other factors of life and not artistic visualization

or neat logic and so ""the literal, though pedestrian, interpretation must prevail.

29. Same view was subsequently reiterated in Member-secretary, Andhra Pradesh State Board for Prevention and Control of Water Pollution Vs.

Andhra Pradesh Rayons Ltd. and Others, . It is also well settled that a very Wide latitude is available to the legislature in fiscal matters but fiscal

enactments require strict interpretation.

30. The Court is bound to give a literal interpretation if there is no ambiguity in the provision. In Patel Chunibhai Dajibhai etc. Vs. Narayanrao

Khanderao Jambekar and Another, , the Apex Court observed that an interpretation of the provision without giving full effect to the; language

used, would be unsupportable and hence not permissible. In Martin Burn Ltd. Vs. The Corporation of Calcutta, , the Apex Court observed as

under:

That a result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress

resulting from its operation. A statute must, of course, be given effect to whether the Court likes the result or not.

31. Similar view has been taken by the Hon"ble Supreme Court in Raees Ahmad v. State of U.P. and Ors. AIR 2000 SC 583; Mool Chand Vs.

Kedar (Deceased) By Lrs. and Others, ; and Kadiyala Rama Rao v. Gutala Kahna Rao (2000) 3 SCC 87.

32. In M/s. VVS Sugars Vs. Govt. of Andhra Pradesh and Others, , the Hon"ble Supreme Court observed that while interpreting the tax statute,

the literal and strict construction is to be applied The Court has to read a fiscal statute as it reads, with no addition and no subtraction on the

ground of legislative intendment and reading it otherwise would defeat the legislative intent. Similar view has been reiterated in Shyam Kishori Devi

v. Patna Municipal Corporation AIR 196c SC 1678; Gulam Yasin Khan Vs. Sahebrao Yeshwantrao Walaskar and Others, ; Orissa State

Warehousing Corporation Vs. Commissioner of Income Tax, ; Arul Nadar Vs. Authorised Officer, Land Reforms, ; and Jagdish Ch. Patnaik and

Others Vs. State of Orissa and Others, .

33. In Karamchari Union, Agra Vs. Union of India and Others, ; the Hon''ble Supreme Court has held that while interpreting the fiscal statute,

general and plain meaning of the words have to be given by the Court. Equity and hardship to an individual assessee are out of place in

interpretation of tax statutes. Similar view has been reiterated in Commissioner of Income Tax, Bhopal v. Hindustan Elector Graphites Ltd. Indore

AIR 2000 SC 1481; and The Travencore Rubber and Tea Co. Ltd. Vs. Commissioner of Income Tax , Trivandrum, .

34. In Molar Mal (Dead) Through L.Rs. Vs. M/s. Kay Iron Works(P) Ltd., , the Hon''ble Supreme Court held that unless the statute, read as a

whole, indicates a different meaning or provides for inconsistency, the Court has to interpret the language of the provisions literally and merely

because a law causes hardship, it cannot be read otherwise.

35. Thus, it is evident that while deciding a case under fiscal statute, the Court cannot import the principles of equity nor it can take into account the

question of hardship to the assessee merely for the reason that assessee could not have transferred the liability of duty to consumers and it was not

possible for him to recover the same at that stage.

36. In the instant case, relevant issue is regarding application of the proviso to Section 11A of the Act 1944. The proviso is read as a restriction to

the generality of the main provision and it may also be termed as an exception to the main part of the statute but it has to be read in the context of

the main proviso and not as an independent one. The proviso must be read with relation to the principal matter to which it stands as a proviso. It

should not be treated as an independent enacting clause instead of being dependent on the main enactment. Vide Sukhwinder Pal Bipan Kumar

and Others Vs. State of Punjab and Others, ; Indian Oil Corporation Ltd. Vs. The Chief Inspector of Factories and Others, ; Smt. Mallawwa Etc.

Vs. The Oriental Insurance Co. Ltd. and Others, ; Balchandra Anantrao Rakvi and Ors. v. Ramchandra Tukaram (Dead) by LRs. and Anr.

(2001) 8 SCC 616.

37. In The Commissioner of Income Tax, Mysore, Travancore-cochin and Coorg, Bangalore Vs. The Indo Mercantile Bank Limited, , the

Hon''ble Supreme Court held as under:

The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from

the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily, it is foreign to the proper function of a

proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment. The territory of

a proviso, therefore, is to carve out an exception to the main enactment and exclude something which otherwise would have been within the

section. It has to operate in the same field and if the language of the main enactment is clear, it cannot be used for the purpose of interpreting the

main enactment or to exclude by implication what the enactment clearly says unless the words of the proviso are such that that is its necessary

effect.

38. While deciding the said case, the Supreme Court placed reliance upon a decision of the Privy Council in S. M. Railway Co., Ltd. v. Bezwada

Municipality , wherein it had been observed that ""proper function of a proviso is to except and deal with a case which was otherwise fall within the

general language of the main enactment, and its effect is confined to that case.

39. In Babulal Nagar and Others Vs. Shree Synthetics Ltd. and Others, , Hon''ble Supreme Court observed as under:

Proviso does cut down the ambit of the main provision but it cannot be interpreted to denude the main provision of any efficacy and reduce it to a

better provision. Both must be so interpreted as to permit interference which if not undertaken, there would be miscarriage of justice.

40. In Commissioner of Sales Tax, Orissa and Another Vs. Halari Store, , the Hon''ble Supreme Court dealt with a case under the Sales Tax Act,

wherein the suo motu power of revision has been conferred upon the statutory authority by the proviso but not to file a revision by the assessee, as

for him there was a provision of appeal. Explaining the discrepancy, the Court held that normally a proviso is ""enacted to carve out something

special out of the general enactment or to qualify what is in the enactment.

41. In Satnam Singh and others Vs. Punjab and Haryana High Court and others, , the Hon''ble Supreme Court explainging the scope of proviso,

held as under:

A proviso has to be strictly construed inasmuch as it carves out an exception to the general rule. The general rule enacted in the main part is not

only to be unduly restricted by expanding the contents of the proviso which is intended to carve out the exception from the general rule.

42. In J.K. Industries Ltd. and Others Vs. Chief Inspector of Factories and Boilers and Others, , while expanding the scope of proviso the Court

held as under:

A proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the court is required to carefully

scrutinize and find out the real object of the proviso appended to that provision. It is not a proper rule of interpretation of a proviso that the

enacting part or the main part of the section be construed first without reference to the proviso and if the same is found to be ambiguous only then

recourse may be had to examine the proviso as has been canvassed before us. On the other hand an accepted rule of interpretation is that a

section and the proviso thereto must be construed as a whole, each portion throwing light, if need be, on the rest. A proviso is normally used to

remove special cases from the general enactment and provide for them specially.

A proviso qualifies the generality of the main enactment by providing an exception and taking out from the main provision, a portion, which, but for

the proviso would be a part of the main provision. A proviso must, therefore, be considered in relation to the principal matter to which it stands as

a proviso. A proviso should not be read as if providing something by way of addition to the main provision which is foreign to the main provision

itself.

Indeed, in some cases, a proviso, may be an exception to the main provision though it cannot be consistent with what is expressed in the main

provision and if it is so, it would be ultra vires of the main provision and struck down. As a general rule in construing an enactment containing e

proviso, it is proper to construe the provisions together without making either of them redundant or otiose. Even where the enacting part is clear, it

is desirable to make an effort to give meaning to the proviso with a view to justify its necessity.

43. Thus, it is evident from the above, that a proviso to statutory provisions provides for an exception and, therefore, authorities dealing with the

matter are required to give strict interpretation to the same.

44. So far as the application of the proviso to Section 11A of me Act 1944 is concerned, it has also been considered by the Hon"ble Apex Court,

High Courts and Tribunals time and again. The proviso provides for resorting to certain proceedings even after expiry of limitation period under

certain circumstances.

45. In Collector of Central Excise v. Chemphar Drugs & Liniments AIR 1989 SC 832, the Hon"ble Supreme Court held as under:

In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to Sub-

section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short paid, or erroneously

refunded by reasons of either fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or Rules

made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or

producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any

liability, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or willful

misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a

particular case.

46. Similarly in Padmini Products Vs. Collector of Central Excise, Bangalore, , the Hon''ble Supreme Court held that ""mere failure or negligence

on the part of the producer or manufacturer either not to take out a licence in case where there was scope for doubt as to whether licence was

required to be taken out or where there was scope for doubt whether goods were dutiable or not, would not attract Section 11A of the Act.

47. In Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay, , Hon''ble Apex Court held that where the assessee acted under a bona

fide impression based on the judgments of the High Court, he cannot be held guilty of suppression of facts etc. and provision of Section 11A of the

Act 1944 were not attracted.

48. In Tamil Nadu Housing Board v. Collector of Central Excise, Madras (1995) Suppl (1) SCC 50, the Hon''ble Apex Court held as under:

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 visualized 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 visualized 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 visualized 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 if 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 leveable 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.

49. In Prabhu Steel Industries Ltd. Vs. Collector of Central Excise, Nagpur, , the Hon''ble Apex Court held that if the goods had been cleared in

accordance with the approved classification list and el material facts were in the knowledge of the revenue authorities, mere change in opinion as to

correct the classification/description of inputs is not sufficient to invoke the extended period of limitation, particularly when then was no

concealment of facts.

50. In Lubri-Chem Industries Ltd. Vs. Collector of Central Excise, Bombay, , the Hon''ble Supreme Court examined the same issue and placing

reliance upon Chemphar Drug (supra) held that for invoking the proviso to Section 11A, it has to be established that there had been an indention to

evade duty and there had been something more positive than mere inaction or failure on the part of the assessee or conscious or deliberate

withholding of information when the assessee knew other wise, was required before he could be saddled with any liability beyond the. period of

general limitation, and unless the assessee is found to be guilty of any fraud or collusion or misstatement by suppression of fact with intent to evade

payment of excise duty, the extended period of limitation cannot be applied.

51. In Collector of Central Excise, Ahmedabad Vs. I.T.E.C. (P) Ltd., Bombay, , the Hon''ble Supreme Court considered the meaning of ""related

person"". Section 4(4)(c) of the Act 1944 defines ''related person'' as a person who is so associated by the assessee that they have interest, directly

or indirectly in the business of each other. Therefore, if A has interest in the business of B but B does not have interest in the business of A, they

will not be related person for the reason that ""the mutuality of the interest between the two is apparent and in absence of any evidence regarding

mutuality of interest, it cannot be held that they were related person and they cannot 1 e held to be related persons"" and in such an eventuality, the

revenue must deal with parties concerned before approving the Price List. The assessee has disclosed the correct facts including the price at which

the goods were sold to related person and the difference in the price, it is futile in view of the declaration to contend that there was any suppression

of fact on the part of the assessee and the provisions of Section 11A of the Act 1944 cannot be made applicable by the revenue.

52. In P and B Pharmaceuticals (P) Ltd. Vs. Collector of Central Excise, , the Hon''ble Apex Court allowed the case of the assessee that where

he had been disclosing the relationship with the distributor from time to time and it was in full knowledge of the Revenue, the issue could not be

reopened applying the extended provision of limitation.

53. Similarly, in Easland Combines, Coimbatore Vs. The Collector of Central Excise, Coimbatore, , the Hon''ble Apex Court examined a case

wherein a Clerk of the assessee made an assumption that as the Company had been registered as SSI unit at Trivendrum, it did not require to

obtain such certificate at Coimbatore and the mistake of the Clerk was bona fide, it cannot be concluded that it was a willful misstatement by

suppression of fact for getting the benefit of exemption of notification. The Court also took the note of the fact that the classification list submitted

by the assessee had also been approved by the revenue on the said assumption without noticing that separate SSI certificate filed by the factory at

Coimbatore was required and had not been obtained and not being a case of intentional evasion of duty, their Lordships held that provision of the

extended period of limitation were not applicable.

54. Thus, in view of the above, it becomes evident that where the list for classification/valuation is submitted by the assessee and it is approved by

the revenue and even if there has been a bona fide mistake or the part of the assessee without establishing the willful evasion of duty or intentional

suppression of material information, the provisions of extended limitation cannot be applied. The revenue has to establish that there has been a

positive act on the part of the assessee and not merely a passive act/negligence or mission for evasion of duty or furnishing the relevant facts

regarding its product. If the classification has been approved by the revenue having full facts before it, the assessee cannot be held responsible for

the reason that the department cannot be permitted to take the benefit of its own mistake. Vide G.S. Lamba and Others Vs. Union of India (UOI)

and Others, ; and Narender Chadha and Others Vs. Union of India and Others, .

55. In Amrutanjan Ltd. v. Collector of Central Excise 1905 (77) ELT 500, the Hon''ble Supreme Court observed that as the Amrutanjan Pain

Balm Ayurvedic was having contents like Menthol IP, Camphor IP, Turpentine IP and Methyl Salicylate IP as main ingredients, which was to be

classified as Ayurvedic medicine under sub-heading 3003.30 of the Act 1985, as the ingredients in it were known both to Ayurvedic and western

sciences and had been used in making the medicines, the real test is to determine as to whether the main ingredients have pharmaceutical quality

and are usable in medicinal preparations.

56. In Adhyaksha Mathur Babu''s Sakti Oushadhalaya Dacca (P) Ltd. and Others Vs. Union of India (UOI), , the Constitution Bench of the

Hon''ble Supreme Court examined the provisions of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, wherein certain contents

according to the standard Ayurvedic text were classifiable as medical preparation; though the same could also be used as ordinary alcoholic

beverage and held that the same were liable to duty under Item 1 of Schedule II of the Act 1955, notwithstanding the decision of the Standing

Committee and consequential omission of those preparations from the list appended to the Rules framed under the Act 1955 and the preparations

could not be subjected to excise duty at all. The main question for their Lordships'' consideration was had been as to whether the three

preparations were in fact medicinal preparations containing alcohol falling within Item 84, List I of the 7th Schedule to the Constitution, on which

item, the Act was passed and so whether they were medicinal preparations as defined under the Act and Court held that if they ire medicinal

preparations as defined therein, they would be governed only by the Act. The Constitution Bench of Hon''ble Supreme Court emphasised that it

becomes the duty of the statutory authority as to whether the preparations had been in accordance with the recipe given in the standard text books

of Ayurved and under the instructions of the qualified persons.

57. In 1994 (71) ELT 1069 , the CEGAT itself held that Hajmola Candy containing 25% active ingredients as per Ayurvedic texts and 75% sugar

for taste and as a preservative, manufactured under Drug Controller''s licence under the Act 1950 was classifiable as Ayurvedic medicine under

sub-heading 3003.30 of Tariff Act 1985 and not as sugar confectionary.

58. In B.P.L. Pharmaceuticals Ltd. v. Collector of Central Excise, Vadodara 1995 Supp. (3) SCC 1, Hon''ble Supreme Court held while

examining such an issue, the Court/Tribunal/Authority must examine the relevant factors and that include label, literature and medicinal preparations

concerning the product in question. It is so because the label specifies many thing and may reveal what are its content, for what it can be used, for

what purpose, it should not be used, whether it is dangerous for life or health and the method of its application. The literature for that purposes

must be the standard text book used only by registered medical practitioner or hospital or laboratory. It may explain that if a particular ailment for

which the drug is prepared is included, which may lead to serious problems. So far as the medicinal preparations of the product are concerned, it

can be governed from the technical and/or pharmaceutical references of the product and the revenue is also at liberty to produce such material

discrediting the case of the assessee. If a product has therapeutics or prophylactic uses, it should be classified as medicaments under Chapter 30

and the Court held that as the shampoo ""Selsun"" in that case had medicinal value, it was held to be classifiable under Chapter 30 and not 33.

59. In Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur, , the Hon''ble Supreme Court held that scientific and

technical meaning of the terms and expressions used in the tax laws may not be resorted to rather goods to be classified according to the popular

meaning attached to them by those using the product. The issue involved there, had been as to whether the Dantmanjan Lal manufactured by the

appellant-company fell within the meaning of Ayurvedic medicine to qualify exemption from payment of excise duty under notification dated 1st

March, 1978. The Apex Court took note of the fact that before the Adjudicating Authority or Appellate Authority, the said appellant company

claiming exemption, did not adduce any evidence to show and prove that it was entitled for exemption showing that the common-man using the

said Dantmanjal Lal daily, considered to be a medicine and not as a toilet requisite.

60. The said case was reconsidered by the Hon''ble Apex Court in Commissioner of Central Excise, Calcutta Vs. Sharma Chemical Works, , and

the Court held as under:

It is settled law that the onus or burden to show that a product falls within a particular tarrif item is always on the Revenue. Mere fact that a

product is sold across the counters and not under a doctor''s prescription, does not by itself lead to the conclusion that it is not a medicament. We

are also in agreement with the submission of Mr. Lakshmikumaran that merely because tie percentage of medicament in a product is less, does not

also ipso facto mean that the product is not a medicament. Generally, the percentage or dosage of the medicament will be such as can be absorbed

by the human body. The medicament would necessarily be covered by fillers/vehicles in order to make tie product usable. It could not be denied

that all the ingredients used in ""Banphool Oil"" are those which are set out in the Ayurveda textbooks. Of course the formula may not be as per the

textbooks but a medicament can also be under a patented or proprietary formula. The main criterion for determining classification is normally the

use it is put to by the customers who use it. The burden of proving that Banphool Oil is understood by the customers as a hair oil was on the

Revenue. This burden is not discharged as no such proof is adduced. On the contrary, we find that the oil can be used for treatment of headache,

eye problem, night blindness, reeling head, weak memory, hysteria, amnesia, blood pressure, insomnia etc. The dosages required are also set out

on the label. The product is registered with the Drug Controller and is being manufactured under a drug licence.

Another aspect to be kept in mind is that the; Revenue is bound by the circulars issued by the Board. The board circular dated 5.12.1991 clearly

stipulates that in case of doubt the matter should be referred to the Drug Controller. The matt was referred to the Drug Controller who, as stated

above, has opined that it is an Ayurveda medicament. If the Department was still entertaining any doubts, they could have referred the matter to the

Advisor, Ayurveda/Sub-Commissioner in the Office of Drug Controller of India, Director General of Health Services, New Delhi. This was not

done.

61. The Hon''ble Supreme Court categorically held in this case that the ratio of Shree Baidyanath (supra) has no bearing in a case like instant.

62. Similar view has been taken in Commissioner of Central Excise, Calcutta-IV Vs. Pandit D.P. Sharma, , and distinguishing the case of Shree

Baidyanath (supra) and following the judgment in Sharma Chemical Works, the Court held that ""Himtaj Oil"" was an Ayurvedic medicament.

63. In The State of Goa and Another Vs. Colfax Laboratories Ltd. and Another, , a similar issue was considered as to whether the preparation,

i.e. shave lotion was a medicinal preparation or toilet/cosmetic preparation. The Hon''ble Apex Court explained the distinction in both holding that

in order to come within the ambit of medicinal preparation, the intended use of the article must be for treatment, mitigation or prevention of disease.

The article must be used for the purpose of either curing or mitigating the disease after its symptoms have appeared or in prevention of any disease.

If the intended use of the article is not for anyone of the aforesaid purposes, it cannot be described as a medicinal preparation. The Court further

explained that ""Disease"" means an impairment of the normal state of the living animal that interrupts or modifies the performance of the vital

functions being a response to environmental factors (as malnutrition, industrial hazards, or climate) or to specific infective agents (as worms,

bacteria, or viruses) or to inherent defects of the organism (as various genetic anomalies) or to combinations of these factors.

64. In Union of India (UOI) Vs. Hindalco Industries, , the Hon''ble Apex Court examined a case wherein the show cause notice issued u/s 11A of

the Act 1944 had been challenged in the writ jurisdiction before the High Court. The Apex Court held that normally in taxation natters, the High

Court should not interfere at the stage of show cause notice but the limitation is self-imposed by the Courts and where the authority lacks

jurisdiction to issue notice, the Court can definitely interfere even at that stage. The Apex Court made it clear that if the authority has jurisdiction in

respect of one aspect but has no jurisdiction in respect of another issue alleged in the notice, the Court would be justified in interfering in respect of

the issue to which the authority has no jurisdiction. In the said case, the question arose as in a case where the authority had power for directing

enquiry in respect of clandestine removal of goods, as to whether the Assessee could have been directed to file explanation also in regard to the

matters concerning incorrect valuation. The Apex Court answered in the negative.

65. Similarly, in Naturalle Health products (P) Ltd. v. Collector of Central Excise, Hyderabad JT 2003 (8) SC 614, the Apex Court held that it is

not permissible for the authorities to reopen an issue or hold an enquiry in respect of the matter only on the ground that the authority had

competence to reopen some other connected issue. The Court further held that the r-al test to determine regarding the classification of products

claimed to be Ayurvedic medicines would be to find out as to how the customers, practitioners in Ayurvedic medicines, dealers and licensing

officials treat the product end where all the ingredients of the products in question are mentioned in the authoritative book of Ayurveda, the mere

fact that the ingredients are purified or added with some preservatives, does not really alter their character.

66. From the aforesaid settled legal proposition, it becomes evident that while deciding the case like instant, the statutory authority must deal with

the issue as to whether a product falls within Chapter 30 or 33 of the Act 1985 and definition of medicament is to be given strict adherence as

provided under the Act 1944. Burden to prove that a particular product falls within a particular Chapter of Act 1985, lies upon the revenue and

not upon the assessee and for the same, evidence is to be adduced and the contents of the products have to be analysed in order to determine as

to whether some of them have medicinal values and it is not relevant as to whether the said content is dominant or dormant. The authority is also

under a legal obligation to examine the textbook, literature, affidavits and certificates given by the assessee and experts and if the classification list

has earlier been approved by the revenue and there is no concealment of fact, the assessee should not suffer for the fault of the revenue even if it

has wrongly been accepted by it.

67. The instructions issued by the department are binding on the authorities for the reason that the issuing a circular/instruction is intimately

conversant not only with the policy of legislation for the purposes of the provisions of the Act but also familiar with the nature and qualities of the

commodities and also their use from time to time, therefore, such notifications/circulars/executive instructions in fiscal statutes are binding. Apart

from the fact that circulars of the Board are binding on the tax department, they are in the nature of contemporanea expositing furnishing legitimate

aid the construction to the relevant provisions. More so, it is necessary to issue such circulars to give effect to internal complexity of fiscal

adjustment of diverse elements. Vide The State of Orissa Vs. Dinabandhu Sahu and Sons, ; K.P. Varghese Vs. Income Tax Officer, Ernakulam

and Another, ; Keshavji Ravji and Co. v. CIT and Ors. : [1990]183ITR1(SC) ; Commissioner of Income Tax v. Vasudeo v. Dempo 1993 Supp

(1) SCC 612; Collector of Central Excise, Bombay Vs. Jayant Dalal Private Ltd., ; Bengal Iron Corporation and another Vs. Commercial Tax

Officer and others, ; M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise, ; M/s. Poulose and Mathen Vs. Collector of Central

Excise and another, ; British Machinery Supplies Co. Vs. Union of India (UOI) and Others, ; and Collector of Central Excise, Patna Vs. Usha

Martin Industries, etc., ; and Pandit D.P. Sharma (supra).

68. It is well established rule of interpretation of a statute by reference to the exposition it has received from contemporary authority. However, the

Apex Court added the words of caution that such a rule must give way where the language of the statute is plain and unambiguous. Similarly, in

Collector of Central Excise, Bombay and Anr. v. Parley Export (P) Ltd. AIR 1980 SC 644, the Hon''ble Supreme Court observed that the words

used in the provision should be understood in the same way in which they have been understood in ordinary parlance in the area in which the law is

in force or ay the people who ordinarily deal with them. In Indian Metals and Ferro Alloys Ltd., Cuttack Vs. The Collector of Central Excise,

Bhubaneshwar, , the Hon''ble Supreme Court has applied the same rule of interpretation by holding that ""contemporanea expositio by the

administrative authority is a very useful and relevant guide to the interpretation of the expression used in a statutory instrument."" Same view has

been taken by the Hon''ble Supreme Court in State of Madhye Pradesh v. G.S. Daal and Flour Mills (Supra); and Y.P. Chawla and others Vs.

M.P. Tiwari and another, . In N. Suresh Nathan v. Union of India and Ors. 1992 (Suppl) 1 SCC 584; and M.B. Joshi and Ors. v. Satish Kumar

Pandey and Ors. 1993 (Suppl.) 2 SCC 419, the Apex Court observed that construction in consonance with long-standing practice prevailing in

the concerned department is to be preferred.

69. In J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union of India (UOI) and Ors, , it has been held that the maxim is applicable h

construing ancient statute but not to interpret Acts which are comparatively modern and an interpretation should be given to the words used in

context of the new facts and situation, if the words are capable of comprehending them. Similar view had been taken by the Apex Court in The

Senior Electric Inspector and Others Vs. Laxmi Narayan Chopra and Others, .

70. In Desh Bandhu Gupta and Co. and Others Vs. Delhi Stock Exchange Association Ltd., , the Apex Court observed that the principle of

contemporenea expositio, i.e. interpreting a document by reference to the exposition it has received from Competent Authority can be invoked

though the same will not always be decisive of the question of construction. The administrative construction, i.e. the contemporaneous construction

placed by administrative or executive officers responsible for execution of the Act/Rules etc. generally should be clearly wrong before it is over-

turned. Such a construction commonly referred to as practical construction although not controlling, is nevertheless entitled to considerable weight

and is highly persuasive. However, it may be disregarded for cogent reasons, n a clear case of error the Court should, without hesitation refuse to

follow such construction for the reason that ""wrong practice does not make the law."" Vide Municipal Corporation for City of Pune and another Vs.

Bharat Forge Co. Ltd. and others, . In D. Stephen Joseph Vs. Union of India and others, , the Hon''ble Supreme Court has held that ""past

practice should not be upset provided such practice conforms to the rules"" but must be ignored if it is found to be dehores the rules.

71. However, in Laxminarayan R. Bhiattod and Ors. v. State or Maharashtra 2003 AIR SCW 2020, the Apex Court held that ""the manner in

which a statutory authority had understood the application of a statute would not confer any legal right upon a party unless the same finds favour

with the Court of law dealing with the matter"".

72. There can be no dispute to the settled legal proposition that the Court or Tribunal is not permitted to decide a case going out of pleadings of

the parties nor the evidence led on a non-existing plea is permitted to be taken into consideration. Vide Sri Mahant Govind Rao v. Sita Ram

Kesho (1898) 25 IA 195 (PC); Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, ; Kishori Lal Vs. Mst. Chaltibai, ; Samant N. Balkrishna

and Another Vs. V. George Fernandez and Others, ; Dalim Kumar Sain and Others Vs. Smt. Nandarani Dassi and Another, ; Dattatraya Vs.

Rangnath Gopalrao Kawathekar (Dead) by his legal representatives and Others, ; Bhoona Bi and Another Vs. Gujar Bi, ; DR. R.K.S. Chauhan v.

State of U.P. and Ors. 1995 Supp (3) SCC 688; Commissioner of Income Tax, Calcutta Vs. Park Hotel (P) Ltd., 15 Park Street, Calcutta-16, ;

Syed Dastagir Vs. T.R. Gopalakrishnasetty, ; M/s. Saraswati Industrial Syndicate Ltd. Vs. The Commissioner of Income Tax, Haryana, Rohtak, ;

J. Jermons Vs. Aliammal and Others, ; Life Insurance Corporation of India and Others Vs. Jyotish Chandra Biswas, ; Om Prakash Gupta Vs.

Ranbir B. Goyal, ; and Ashutosh Gupta Vs. State of Rajasthan and Others, .

73. It is not possible for the Court to decide an issue, not raised/agitated by the authority for the reason that other party did not have opportunity to

meet it and such a course would violate the principles of natural justice. Vide New Delhi Municipal Council v. State of Punjab AIR 1997 SC 2841

Similarly, in V.K. Majotra Vs. Union of India (UOI) and Another, , the Apex Court held as under:

The Courts would be well advised to decide the petitions on the points raised in the petition and if in a rare case keeping in view the facts and

circumstances of the case any additional points art to be raised then the concerned and affected parties should be put to notice on the additional

points to satisfy the principles of natural justice. Parties cannot be taken by surprise.

74. Section 11A of the Act 1944 empowers the reopening of an assessment as well as the modification of the classification list while reopening the

assessment.

75. Reopening is not permissible by mere change of opinion. Vide Maharajadhiraj Sir Kamleshwar Singh v. State of Bihar 1959 SC 303; Calcutta

Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, ; Commissioner of Income Tax, Gujarat Vs. Bhanji Lavji,

Porbandar, ; Income Tax Officer, Income Tax-cum-Wealth Tax Circle II, Hyderabad Vs. Nawab Mir Barkat Ali Khan Bahadur, Hyderabad, ;

Income Tax Officer v. Lakhmani Mewal Das 1976 SC 1753; Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income

Tax, New Delhi, ; Delhi Cloth and General Mills Co. Ltd. Vs. State of Rajasthan and Others, ; Prabhu Steel Industries Ltd (supra).

76. In Ahmedabad Manufacturing & Calico Printing Co. Ltd. v. Union of India (1993) Supp. 2 SCC 7; Commissioner of Central Excise v.

Hindustan Safety Glass Works Ltd. 1995 (77) ELT 40 (SC); and Union of India v. Maheshwari Woolen Mills 1998 (97) ELT 220 (SC), the

Hon"ble Supreme Court held that while dealing with a case like instant, the Courts have t be conscious enough that the order may be quashed only

to the extent of extended period of limitation and not for the period of six months for the reason t lat the notice remains valid to that extent. Though

in T.N. Dadha Pharmaceuticals Vs. Collector of Central Excise, Madras, , entire notice was quashed, i.e. notice even for the period of six months,

holding that for the purpose of application of Section 11A, all the three ingredients, i.e. duty of excise has not been levied or short paid for the

reason of fraud, collusion, misstatement of facts etc. and it was intentionally done by the assessee. The requirements were held to be cumulative

and not alternative.

77. Suppression of facts means that it should be intentional and to be read in context of other words, like fraud, collusion or willful default and

requires to be considered very strictly. Mere omission to disclose the correct information is not a suppression of fact unless it was deliberate to

escape the payment of duty and there can be no suppression when the facts were known to the assessee as well as the revenue. Vide Pushpam

Pharmaceuticals Co. Ltd. v. Commissioner of Central Excise (1995) Supp. 3 SCC 462.

78. Similarly, the willfulness and intent refer to mental state at the time of doing or omitting to do an act by a person. Thus, it has to be gathered

from assessing the overall facts and circumstances of the case as to whether the assessee intended to evade duty. Same remained the position

regarding mis-declaration and in case declaration has been made by the assessee to the best of its knowledge considering the facts and

circumstances of the case and the quality of the product, the charge of mis-declaration cannot be sustained. The concealment and suppression must

be in order to deceit the revenue keeping it in dark so that it acquiescence and endorses an unlawful act thinking that it is lawful when it approved

the act in the full knowledge of the relevant particulars to it in good faith, that cannot be a case of deceit, fraud or concealment or suppression.

79. The onus to prove fraud, misstatement is on the Revenue and not otherwise. It is only when the Revenue discharges its onus, the burden is

shifted to the assessee to prove that he never intended to evade the liability. Evidence led by the assessee cannot be brushed aside by the authority

concerned rather it has to be dealt with in accordance with law. Nor it is permissible for the authority to ignore the relevant evidence/factor, taking

into consideration irrelevant documents.

80. The instant case requires to be examined in the light of the aforesaid settled legal proposition. Admittedly, assessee has a licence under the Act

1940. It has submitted the price list, questionnaires, invoices from time to time. Its classification has been approved provisionally and subsequently

finally by the authorities concerned and had consistently been accepted. In the receipts and returns, invoices have also been filed showing that 98

percent of the products are sold to the petitioner No. 2 and the petitioner No. 1 has interest h petitioner No. 2 and has a control over it but

petitioner No. 2 does not have control over petitioner No. 1. Only 2 percent of its product are being sold in the open market. It had also filed

affidavits of several Vaidyas, literature, Ayurvedic textbooks to show that the product had been Ayurvedic medicines. The Adjudicating Authority

as well as the Tribunal had never asked for chemical analysis of its product; no report had ever been asked from any Drug authorities under the

Act 1940 about the contents thereof; no product had ever been sent for chemical analysis seeking the report regarding its constituents; no evidence

hid been led by the revenue to establish that the products did not have any medicinal value and, therefore, will fall within the ambit of Chapter 30

and not 33. There was no mutuality of interest between the petitioners No. 1 and 2 as only petitioner No. 1 had been interested in petitioner No. 2

and not vice-versa. Investigations had been carried out since 1989 and in view of the provisions of Rule 173 of the Rules 1944, the classification

list filed along with the questionnaire end price list etc. had always been approved after holding enquiry vide orders dated 26.08.1994 and

29.09.1994, as referred to above. The petitioners'' case had always been accepted by the Adjudicating Authority, as is evident from the orders

referred to above, particularly orders dated 29.08.1989, 29.01.1992 and 07.09.1998. Its products had always been classified under Chapter 30

vide order dated 29.09.1994. The petitioners had always been submitting the required information to the department. Thus, there can be no case

of suppression of material facts or misstatement of facts. There is nothing on the record to show that there had been any kind of fraud, collusion or

suppression of material fact or information in this regard, as there was no fir ding by the Adjudicating Authority on the issue of suppression of fact

and, therefore, it was not warranted that the Tribunal would deal with the issue.

81. Neither the Adjudicating Authority nor the learned Tribunal considered it proper to send any of the products of the petitioners for chemical

analysis, though the Hon''ble Apex Court while interpreting the circulars issue j from time to time by the Revenue, had emphasised upon the need

of such analysis, nor there is any explanation for deviating the understanding of the department and acceptance of the explanation given by the

petitioners earlier. Undoubtedly, administrative interpretations may not be binding upon the authority concerned but it must record certain reasons

for taking a different view. There were no pleadings before the Adjudicating Authority or the Tribunal on behalf of the Revenue on the basis of

which it could conclusively be held that the products of the petitioners were purely cosmetics and had no medicinal value at all. What to talk of any

leading evidence to substantiate the same, the department did not produce any article etc. or any opinion of expert in this regard nor any

explanation has been furnished by the authorities below no giving due weightage to the reports of the experts produced by the Assessee. Thus, we

failed to understand on what basis and relying upon what documentary evidence, the findings have recorded against the Assessee.

82. The crystal-clear finding of fact recorded by the learned Tribunal is that there was no suppression of the material fact with respect to

classification. Therefore, the Tribunal erred in invoking the suppression of Section 11A of the Act 1944 holding that the fact that petitioner No. 2

was related person, was not known, and this fact had been suppressed. The assessee has definitely disclosed that Shahnaz Hussain was controlling

Partner in Saharab Chemicals. As the facts had been fully disclosed, there was no occasion for drawing an inference of petitioner being a related

person-qua-Saharab Cosmetics, and this has been accepted by the adjudicating authority. The Revenue did not challenge their said findings of fact

in appeal. The question of taking up this issue bv the Tribunal was totally unjustified. A literature of the assessee can be looked into. But it has to

be appreciated in a correct perspective that the literature might have been prepared keeping in mind the law of other countries. The averment of

the assessee that the literatures consisted for expert, and particularly, to be understood in foreign countries, like U.K. and United States of

America, have to be printed in a different manner showing the same products as cosmetics for the reason that Ayurvedic system is not accepted to

the medical sciences of those countries and that could not have been a decisive factor, Without sending the product for chemical analysis and

recording a finding as to whether the constituent thereof had medicinal value, the show cause notice was issued invoking the proviso to Section

11A(1) of the Act 1944 on 3 different grounds, including wilful mis-statement and suppression of fact, claiming the products as medicines, though

in some of its literatures it has been shown as cosmetics and the goods had been sold at much lower price to petitioner No. 2, a related person

with a intention to evade excise duty.

83. So far as the 3rd ground was concerned, i.e., suppression of fact with respect to related person with intention to evade duly, the adjudicating

authority has not recorded any finding. The Revenue in its cross-appeal has not taken this issue at all. Thus, the learned Tribunal could not have

raised this issue inasmuch as without giving a show cause notice to the assessee if the Tribunal wanted to examine this issue suo motu and it was

permissible in law for it, the Tribunal did not furnish any explanation giving a discriminator treatment to the petitioner as it had been submitted

before the Trib ;nal that the similar products had been classified as medicines by the same Tribunal in various other cases, and a large number of its

own judgments had been cited before it, particularly, the case of Dabar India, Ishan Research Lab v. Naturance Research Lab etc. The Tribunal

tried to distinguish the case of the assessee from that of Ishan Research Lab on the issue of classification only on the ground that in that case the

Tribunal had classified certain products as Ayurvedic medicines on the basis of the report of Dr. V.N. Pandey, though in the case of assessee the

report of the same expert, i.e., Dr. V.N. Pandey had not been accepted at all. The Tribunal relied upon certain eiticles in the newspapers and

magazines without disclosing as to whether the author of the said article was an expert of the subject and what could have been the evidenciary

value of its opinion.

84. In view of the above, we reach the unescapable conclusion that there had been no mis-statement or suppression on any information required to

be disclosed in law on behalf of the assessee. Therefore, the provisions of Section 11A of the Act 1944 could not be attracted. More so, in the in;

ant case, the period involved had been from March, 1992 to October, 1996. The show cause notice dated July, 1997 was clearly barred by

limitation as the provisions of Section 11A were not applicable.

85. Thus, petition succeeds and is allowed. The judgment arid order dated 14.5.2003 (Annex. 10) and orders dated 7.8.1998 and 24.11.1998

are hereby set aside to the extent the same adversely affected the assessee. So far as the show cause notice relating to subsequent period is

concerned, the authorities are at liberty to make a fresh assessment in accordance with law, and for that purpose, the case is remanded to the

adjudicating authority who after considering the material on record shall permit both the parties to lead evidence to prove their case.

86. In the facts and circumstances of the case, there shall be no order as to costs.