2023 INSC 951

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.10159-10161 of 2010

COMMR. OF CEN. EXC. AHMEDABAD …APPELLANT(S)

VERSUS

M/S URMIN PRODUCTS
P. LTD. AND OTHERS … RESPONDENT(S)

WITH

CIVIL APPEAL NO.6513-6519 OF 2023
(@ DIARY NO.6888 OF 2020)

with

CIVIL APPEAL NO.2469 OF 2020

With

CIVIL APPEAL NO.6521 OF 2023
(@ DIARY NO.3492 OF 2020)

With

CIVIL APPEAL NO.6522 OF 2023
(@ DIARY NO.3487 OF 2020)

With

CIVIL APPEAL NOs.6523-24 OF 2023
(@ DIARY NO.2810 OF 2020)

With

CIVIL APPEAL NO.959 OF 2019

With

CIVIL APPEAL NOs.6538-42 OF 2023
(@ DIARY NO.14581 OF 2019)

With

CIVIL APPEAL NO.6531-37 OF 2023
(@ DIARY NO.44912 OF 2019)

With

CIVIL APPEAL NO.6525 OF 2023
(@ DIARY NO.3484 OF 2020)

With

CIVIL APPEAL NO.6526 OF 2023
(@ DIARY NO.3513 OF 2020)

With

CIVIL APPEAL NO.6527 OF 2023
(@ DIARY NO.3536 OF 2020)

With

CIVIL APPEAL NO.6528 OF 2023
(@ DIARY NO.3544 OF 2020)

With

CIVIL APPEAL NO.6529 OF 2023
(@ DIARY NO.3545 OF 2020)

With

CIVIL APPEAL NO.6530 OF 2023
(@ DIARY NO.3547 OF 2020)

With

CIVIL APPEAL NO. 5146 OF 2015

With

CIVIL APPEAL NO.3596 OF 2023

J U D G M E N T

Aravind Kumar, J.

1. Delay condoned on 23.08.2023.

2. These appeals are divided into seven (7) groups for convenience, and facts of each group are enumerated under the respective groups whereunder questions or points for determination have been formulated and analysed thereunder. For the purpose of convenience, the details of the judgment with reference to each group and details thereof are enumerated hereinbelow in the following table no. 1:

TABLE 1

3. On behalf of the Revenue in the various groups of matters before this Court, we have heard: - (1) Mr. N. Venkataraman, learned Additional Solicitor General of India, (2) Ms. Nisha Bagchi, learned standing counsel.

4. On behalf of the assessee, we have heard: - (1) Mr. S.K. Bagaria and Mr. Vivek Kohli, learned Senior Counsel, (2) Mr. A.R. Madhav Rao, Mr. Rupesh Kumar and Ms. Seema Jain, learned counsel.

5. The Appellants in Group No. (s) 1,2,3,5,6 and 7, and the Respondents in Group No.4, namely the *'Commissioner of Central Excise'* are hereinafter referred to as **"Revenue".** The Appellants in Group No.4 and the respective respondents in Group No. (s) 1,2,3,5,6 and 7, are hereinafter referred to as **"Assessee"** for the sake of convenience and brevity.

6. For ease of reference, the following table no. 2 of nomenclatures/abbreviations is made available below.

TABLE 2

Sr. No.	**Nomenclature/ Abbreviation**	**Particulars / Meaning**
1.	**"BIS"**	Bureau of Indian Standards
2.	**"CBIC"**	Central Board of Indirect Taxes and Customs
3.	**"CETA"**	Central Excise Tariff Act, 1985

4.	**"CE ACT'**	Central Excise Act, 1944
5.	**"CET SH"**	Central Excise Tariff Sub-Heading
6.	**"CESTAT"**	Customs, Excise and Service Tax Appellate Tribunal
7.	**"CTPM"**	Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010
8.	**"CRCL"**	Central Revenue Control Laboratory
9.	**"OIA"**	Order-In-Appeal
10.	**"OIO"**	Order-In-Original
11.	**"CT"**	Chewing Tobacco
12.	**"ZST"**	Zarda/Jarda Scented Tobacco

7. The learned advocates appearing for the parties have placed reliance and referred to various statutory provisions, relevant chapters of CE Act, CETA, CE Rules, CTPM Rules, and various relevant notifications/circulars issued from time to time by the respective departments/ministry. For clarity and ease of reference we have catalogued the same herein in table no.3 below:

TABLE 3

I.	**TARIFF AND NOTIFICATIONS RELATING TO THE PERIOD 2005-2006 ISSUED UNDER CE ACT**
1.	Chapter 24 of the Central Excise Tariff in 2004-05 (6 Digit Code).
2.	Notification No. 13/2002 – CE (NT) dated 01.03.2002 under Section 4A prescribing abatement from MRP for arriving at assessable value.
3.	Notification 10/2003 – CE (NT) dated 01.03.2003 under Section 4A prescribing abatement of 50% for all goods under 2404.41.
4.	Chapter 24 of the Central Excise Tariff in 2005-06 (8 Digit Code)
5.	Circular 808/05/2005- CX dated 25.02.2005 in regard to introduction of 8-digit tariff from 6-digit tariff in vogue earlier.
6.	Notification 2/2006 – CE (NT) dated 01.03.2006 under Section 4A.
7.	Notification 16/2006 – CE (NT) dated 11.07.2006 under Section 4A.
II.	**TARIFF AND NOTIFICATIONS BETWEEN THE YEARS 2010-2015 ISSUED UNDER THE CE ACT**
1.	Notification: 10/2010- C.E. (N.T.) dated 27-Feb-2010 notifying Unmanufactured Tobacco and Chewing Tobacco under Section 3A.
2.	Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 Notification: 11/2010-C.E. (N.T.) dated 27-Feb-2010
3.	Notification: 16/2010 – CE. Dated 27.02.2010 prescribing rate for branded unmanufactured tobacco and chewing tobacco.
4.	Notification: 16/2010 – CE. Dated 27.02.2010 prescribing rate for branded unmanufactured tobacco and chewing tobacco.
5.	Notification: 17/2010 – CE (NT) dated 13.04.2010- Notifies Jarda scented tobacco under Section 3A.
6.	Notification 18/2010 – CE (NT) dated 13.04.2010 – Prescribing the capacity deemed to have been produced for

	chewing tobacco (including Filter Khaini), Unmanufactured Tobacco and Jarda Scented Tobacco.
7.	Notification: 19/2010- C.E. dated 13.04.2010 – prescribing the rate for Chewing Tobacco, Unmanufactured Tobacco and Filter Khaini.
8.	Notification: 14/2012 – CE Dated 14.03.2012 prescribing the new rate for Chewing Tobacco, Unmanufactured Tobacco and Filter Khaini.
9.	Notification: 2/2014 – C.E. dated 24.01.2014 – prescribing the new rate for Chewing Tobacco, Unmanufactured Tobacco and Filter Khaini.
10.	Notification: 17/2014 – C.E. dated 11.07.2014 – Prescribing the new rate for chewing tobacco, unmanufactured tobacco and filter khaini.

8. It would be apt and appropriate to extract Section 11A as it stood in 1980, and as it stood after the amendment brought in 2000 and by Act 10 of 2000 (w.e.f. 17.11.1980) and subsequent substitution by Act 8 of 2011, as it would have a direct bearing on the various batch of appeals before us. They read as under:

1980	2000	2011
Section 11A. Recovery of duties not levied or not paid or short levied or short-paid or erroneously refunded. (1) When any duty of excise has not been levied or paid or has been shortlevied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short- levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice: Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub- section shall have effect, [as if [xxx),]] for the words" six months", the	**Section 11A.** Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.-(1) When any duty of excise has not been levied or paid or has been short- levied or short- paid or [1]**erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder**], a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short- paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice: Provided that where any duty of excise has not	[2]**Section 11.A** Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded-(1)Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded**, for any reason, other than the reason of fraud or collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,-** (a) the Central Excise Officer shall, within [two years] from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

[1] Substituted by Act 10 of 2000, sec. 97(a), for "erroneously refunded" (w.e.f. 17.11.1980)

[2] Subs. By Act 8 of 2011

words" five years" were substituted.	been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words [one year], the words “five years” were substituted. Explanation. - Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of [one year] or five years, as the case may be. [(1A) When any duty of excise has not been levied or paid or has been short-levied or short paid or erroneously refunded, by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty, by such person or his agent, to whom a notice is served under the proviso to sub-section (1) by the Central	

	Excise Officer, may pay duty in full or in part as may be accepted by him, and the interest payable thereon under section 11AB and penalty equal to twenty-five per cent of the duty specified in the notice or the duty so accepted by such person within thirty days of the receipt of the notice.]	

9. The detailed discussion of the relevant provisions, rules, notifications, and circulars and its applicability or otherwise, have been deliberated upon while analysing the facts under each of the group.

A PRELUDE TO THE *LIS*

10. We deem it necessary to briefly state the history of classification of these two competing entries which have been the pivotal issue in all these groups of appeals before this Court, *i.e.,* CET SH 2403 9910 ***('chewing tobacco')*** and CET SH 2403 9930 ***('zarda/jarda scented tobacco')***

11. At the outset, it may be noticed that the expressions ***'chewing tobacco'*** and **'*zarda/jarda scented tobacco'*** are nowhere defined under the CE ACT or CETA. CETA initially covered *'tobacco'* in item No.9 to the schedule. Entry 9(II) was country tobacco and sub-clause (2) thereof read *"if intended for sale as chewing tobacco, whether manufactured or merely cured.*" In 1983, *'tobacco'* was covered under Item 4 of the Schedule of the CE Act. The relevant entry being Entry 4 II (5) which covered *'chewing tobacco'.* In 1985, the CETA was enacted and *'Chewing tobacco'* was shown under Entry 4 II (4). The Finance Act,1987, inserted *"CET SH 2404.39"* with effect from 01.03.1987. The heading included the following:

> "Chewing tobacco including preparations commonly known as *Khara Masala, Kiwam, Dokta, Zarda, Sukha and Surti"*.

Thus, for the first time *'Zarda'* was recognized separately as preparation.

12. In 1996-97, CET SH 2404.40 was reformulated to read *"chewing tobacco and preparations containing chewing tobacco".*

13. In 2002, under Section 4A of the CE Act, Notification No. 13/2002 – CE (NT) dated 01.03.2002 was issued prescribing abatement as percentage of retail sale price. However, it is to be noticed that Notification No.13/2002 had not covered *'Chewing Tobacco'* reflecting under the relevant Entry 2404.21, within its ambit of *'notified goods'* for the purposes of availing benefits under Section 4A. However, subsequently by Notification No.10/2003 – CE (NT) dated 01.03.2003 was issued introducing Entry 24A in Notification 13/2002 dated 1.03.2002, thereby covering all goods under entry 2404.41 within the ambit of *'notified goods'* for the purposes of Section 4A of the CE Act.

14. Prior to the introduction of the 8-digit tariff classification, *'chewing tobacco'* was reflected under Chapter 24, under specific entry *'2404.41'* of the six-digit Central Excise Tariff classification. Subsequently the new 8-digit Central Excise Tariff classification was introduced *vide* Circular 808/05/2005 -CX dated 25.02.2005, Chapter 24 of the Central Excise Tarriff came to be amended and heading **'2403'** was introduced which reads:

> *"2403 – Other manufactured tobacco and manufactured tobacco substitutes; 'Homogenised' or 'Reconstituted' tobacco; Tobacco extracts and essences".*

The Central Excise Tariff Heading **'2403'** included the following sub-headings:

> *"**2403 9910** chewing tobacco*
> ***2403 9920** preparations containing chewing tobacco.*
> ***2403 9930** zarda/jarda scented tobacco."*

15. On 01.03.2006, Notification No.2/2006 was issued, *vide* which Notification No.13/2002 dated 01.03.2002 was superseded. Thus, the list of products, with their respective chapter headings/sub-headings, which were to be covered under the assessment in terms of Section 4A of the CE Act, were notified in terms of the eight-digit tariff classification. However, it is pertinent to note that said Notification No.2/2006 did not include *'Jarda/Zarda scented tobacco – CET SH 2403 9930'* within the scope of 'notified goods' under Section 4A of the CE Act, for availing the benefits of abatement as percentage of retail sale price.

16. Subsequently, Notification No.16 of 2006 dated 11.07.2006 was issued, wherein CET SH 2403 9930 came to be included within Notification No.2/2006 dated 01.03.2006, thereby including '*jarda/ zarda scented tobacco'* within the scope of 'notified goods' under Section 4A of CE Act.

17. It is relevant to note at this juncture, the period between **1.03.2006 and 11.07.2006,** during which the benefits of MRP-based assessment was not available to goods classified under CET SH 2403 9930 as *'jarda/zarda scented tobacco'* is the very same period of dispute which has to be adjudicated in the appeals in Group I (*Urmin Products*) and Group II (*Flakes-n-flavourz*).

18. In light of the evolution of classification of *'chewing tobacco'* and *'jarda/zarda scented tobacco'* having been discussed hereinabove, we proceed to address the issues/questions formulated within the various appeals before us. At the outset, it must be mentioned that the findings and conclusions arrived at will pertain to the issues formulated and

adjudicated in light of the facts relevant to those groups, and hence, the findings are mutually exclusive to the facts of each group.

I. COMMISSIONER OF CENTRAL EXCISE AHMEDABAD V. M/S URMIN PRODUCTS AND ORS. [C. A. NO. 10159 – 10161 OF 2010]

BRIEF FACTS

19. In these appeals, the Revenue has challenged the order dated 25.03.2010 passed by the jurisdictional CESTAT whereunder the classification given by the assessee was accepted as *"flavoured chewing tobacco"* falling under CET SH 2403 9910 and not as '*zarda/jarda scented tobacco*' falling under CET SH 2403 9930 of CETA.

20. The assessee came to be visited with a show cause notice dated 09.07.2007 stating thereunder that the assessee had been manufacturing and clearing the product manufactured by it as *'zarda/jarda scented tobacco*' under the guise of *'chewing tobacco.'* During the visit to the assessee's factory by the Department's officers, they noticed the process of manufacturing '*zarda/jarda scented tobacco.'* The statement of the

production manager and also the statement of the factory in charge came to be recorded, based on which the Department concluded that there was a deliberate intention to evade payment of duty by misclassification and wilful misstatement of their product to enable them to pay lesser duty. Accordingly, by invoking the extended period of limitation as provided under proviso to Section 11A(1) CE Act, the Department called upon the assessee to show cause as to why the product which had been classified as *'chewing tobacco'* should not be classified as '*zarda/jarda scented tobacco'* and why the said product should not be accordingly assessed to duty as per Section 4 of the CE Act, for the period **01.03.2006 to 10.07.2006**. Further, the assessee was required to show cause as to why the penalty as a consequence of wilful misclassification should not be recovered. The said show cause notice came to be adjudicated and the show cause notice including the demand made thereunder, was upheld in OIO dated 28.01.2008. This OIO was challenged and an appeal came to be filed before the CESTAT which came to be allowed and the stand taken by the assessee was upheld by opining as under:

"21. On the other hand, the department has not produced any evidence to show that the product is Tobacco Scented with Zarda. In fact, the learned SDR relied upon the process of manufacture in adjudication order. However, the process of manufacture given in the adjudication order in Para 2 is the manufacturing process as noticed by the officers when they visited the factory premises. This is a flowchart prepared by the officers after their visit. However, when we have a look at the statement of the Production Manager Shri Ramesh Narsinghbhai Patel in the flow chart, the Zarda Scented Tobacco in the process of manufacture is missing. Zarda Scented Tobacco figures in the manufacturing flow chart given by Shri Dipak Suryakant Shah only. Further, it was also brought to our notice that during the period from 19.01.05 to 20.08.05, the appellants had described the product in the classification list as Chewing Tobacco and from 1.3.05, to 31.3.06, it was classified as Zarda Scented Tobacco and from 1.4.06 onwards, the classification description was Chewing Tobacco which continues till today. In the invoice/bills prepared by the appellant, the item was described as Zafrani Zarda and from 1.4.06, it is being called as Baghban Flavoured Chewing Tobacco. It is not the case of the department or the party that there was change in the label or manufacturing process. From the description in the label, it is quite clear that the product is called Flavoured Chewing Tobacco. No expert opinion or information from the trade have been obtained and it is only the statement of factory manager that the product is usually eaten with Pan, Betel nut or Pan Masala etc. Department has come to the conclusion that the product is not Chewing Tobacco. Further, as submitted by the appellant, nowhere in the statement of the employees, it has been stated that Zarda Scent was added. Under these circumstances, in view of the above discussion, neither side has been able to show whether the product is Chewing Tobacco or Zarda Scented Tobacco clearly. Both sides have some points in their favour and some against them. Under these circumstances, in view of the fact that the

> label calls the product as Flavoured Chewing Tobacco, no Zarda Scent has been used and the product has not been sold as Zarda Scented Tobacco by the appellant, we consider that the claim of the appellant that the product is Flavoured Chewing Tobacco has to be accepted. Thus, on merit, the appellants succeed. Therefore, the demand for differential duty fails and naturally the penalties imposed under Section 11AC of Central Excise Act or rules of Central Excise Rules, 2002 also have to be set aside."

21. The issue of limitation was also held in favour of the assessee by opining as under:

> "22. In any case, we consider that the limitation would apply in this case and show cause notice should not have been issued beyond one year in view of the fact that the appellant intimated their intention to change. Further, the appellant had also intimated that the proposed change was not in line with industrial factory. Therefore, extended period also could not have been applied in this case."

22. Hence these appeals.

SUBMISSIONS OF THE PARTIES

23. We have heard Shri N. Venkataraman, learned Additional Solicitor General appearing for the Revenue, and Ms. Nisha Bagchi, appearing for the Revenue.

24. It is the contention of the Revenue that Notification No.2 of 2006 dated 01.03.2006 was issued in supersession of Notification No.13 of 2002 dated 01.03.2002 specifying thereunder that the goods covered under Section 4A of CE Act 1944 was for MRP-based assessment and it did not specify the goods falling under CET SH 2403 9930 that is '*zarda/jarda scented tobacco'*, but it covers the goods falling under CET SH 2403 9910 that is '*chewing tobacco'*. It was contended that as '*zarda/jarda scented tobacco*' was not specified under MRP-based assessment under Section 4A, the goods have to be assessed under Section 4 of the CE Act. Shri Venkataraman, Learned Additional Solicitor General and Shrimati Nisha Bagchi have contended that the assessee changed and misclassified the product from '*zarda/jarda scented tobacco' i.e.,* CET SH 2403 9930 to *'chewing tobacco' i.e.,* CET SH 2403 9910 with an intention to evade payment of duty under Section 4 of the CE Act, 1944 despite there being no change in the nature of the products. It is contended that the assessee despite being aware of the fact that their product was not covered under relevant notification which provides for valuation under Section 4A of CE Act, had continued to avail the benefit of Section 4A of CE Act till

11.07.2006. It is contended by the Revenue, that abatement provided to the goods classifiable under CET SH 2403 9910 *i.e., 'chewing tobacco'* was 50 percent, therefore if the goods are cleared as *'chewing tobacco'* the duty has to be paid on lower value, resulting in payment of such amount of duty as the value determined under Section 4A of CE Act, after 50 percent abatement, which was much less as compared to transaction value under Section 4 of CE Act. It is further contended by the Revenue that *'zarda/jarda scented tobacco'* was brought into the ambit of Section 4A of CE Act, by amendment to Notification No.16 dated 11.07.2006 and thus the product '*zarda/jarda scented tobacco*' was not specified for assessment under Section 4A of the CE Act, for the period **01.03.2006 to 10.07.2006**. Hence, the Revenue sought to justify the demand of duty short paid by the assessee by invoking the proviso under Section 11A (1), along with interest, at the appropriate rate under Section 11AB of the Act 1944.

25. The learned Senior counsel for the Revenue would further elaborate his submissions by contending that the assessee has not shown any proof of record for concluding that *'zarda/jarda scented tobacco'*

is also *'chewing tobacco'*. By contending that this tariff classification was in force during the period of the board's letter dated 23.06.1987, notice dated 15.07.1987, and the notification dated 16.03.1995 and as such they would not come to the rescue of the assessee. It is also urged that the tariff has been aligned to 8 digits and more specifically calculation has been provided where *'chewing tobacco'* and '*zarda/jarda scented tobacco'* have been separately classified and as such the contention of the assessee has no legs to stand.

26. The Revenue would further contend that the assessee is selling its product as "*zafrani zarda"* and as such it cannot claim '*zarda/jarda'* used in the tariff heading is different from '*zarda/jarda'* used by assessee and further, the assessee has not been able to demonstrate how its product is different from '*zarda/jarda scented tobacco'* mentioned in the tariff. The Revenue would also contend that once the product is sold as '*zarda/jarda',* which is specifically covered under CET SH 2403 9930, it cannot claim that the said product would fall CET SH 2403 9910 as *'chewing tobacco'*. The Revenue has drawn the attention of this Court to the fact that assessee earlier classified the product as

'zarda/jarda scented tobacco', and there being no change in classification of the product, to pay duty at lesser value would be without any justification. They would also contend that the tribunal has committed a serious error in ignoring the statement of the persons who were in charge of the factory and the statement of the factory manager which was relied upon by the department to substantiate as to how the assessee had been manufacturing the product, and the process, and there being no change in the manufacturing process, or any new plant and machinery having been installed in their unit. The standing counsel for the Revenue, would also contend that during 2005-06 the assessee themselves described the product as '*zarda/jarda scented tobacco*' and suddenly from April 06, 2006, started describing their product as '*chewing tobacco'* classifiable under CET SH 2403 9910 to avail the benefit of Notification No.2 of 2006 dated 01.03.2006. It was also contended that when two or more headings are available, the product should be classified under the more specific heading according to the description of the product and in the instant group it would fall under CET SH 2403 9930 as '*zarda/jarda scented tobacco'*.

27. The Revenue also contended that tribunal in paragraph 21 of the impugned order having held that *"both sides have some points in their favour and some against them"* failed to elaborate or assign the reasons for extending the benefit of Section 4A to assessee and on this ground alone the impugned order is liable to be set aside.

28. The Revenue would also contend that tribunal committed a serious error in concluding that show cause notice should have been issued within one year period as the assessee intimated their intention to change the classification and contended that the assessee has not mentioned any details of the products which they were manufacturing at that material time but had only forwarded a cryptic communication, lacking details and bereft of material particulars, namely the intention of changing the heading and classification of the product which was being manufactured by them and no evidence for reasons of change was forthcoming from the said communication, and as such the assessee cannot take umbrage under the said communication to stave-off its liability or, to contend that extended period of limitation cannot be applied as the department knew about such change.

29. The learned counsel appearing for the respondent – asseessee by supporting impugned order passed by the tribunal would contend that intention of the Revenue/Government was to levy duty on the product manufactured by the appellant-assessee under Section 4A of CE Act only. He would submit that the product manufactured by the assessee was classified under CET SH No.2404.41 as *'chewing tobacco'* and duty was assessed under Section 4A of CE Act on MRP basis and accordingly duty was paid. He would contend that with introduction of the 8 (eight) digit tariff era, assessee classified its product as *'zarda/jarda scented tobacco'* under CET SH 2403 9930 for the period 01.03.2005 to 28.02.2006. At this juncture, he would hasten to add that in accordance with the policy on taxation on 'tobacco production', the duty assessment regime remained constant *i.e.,* under Section 4A of CE Act on MRP basis only. He would contend that Notification No.2 of 2006 dated 01.03.2006 which was issued superseding Notification No.13 of 2002 dated 01.03.2002 under the list of notified goods with the respective Chapter heading/sub-heading, would cover assessment in terms of Section 4A of the CE Act. Though notified, by oversight

'*zarda/jarda scented tobacco'* under CET SH was omitted, he would contend that taxation of '*tobacco products'* remains constant *i.e.,* under Section 4A of CE Act on MRP basis. In this background he would contend that throughout the respondent-assessee has classified its product as '*chewing tobacco'* with the knowledge and acceptance of the Department.

30. He would also contend that the extended period of limitation could not have been invoked in the background of assessee having intimated the Department about the change in classification in advance and there was no suppression of fact or mis-declaration.

31. He would also contend that assessment under Section 4 of the CE Act in terms of the transaction value of the product, the price charged and recovered by the assessee would necessarily have to be treated as cum-duty-price and assessment ought to be done and when such an exercise is undertaken the differential duty would be insignificant.

32. He would contend that the product manufactured by the assessee is only '*chewing tobacco'* and '*zarda/jarda scented tobacco*', which expressions are not defined under the Act and no explanation is provided on what products could possibly have been covered under the heading '*zarda/jarda scented tobacco*', or what is the scope of that heading. In that view of the matter, he would contend that the '*Common Trade Parlance Test'* as has been enunciated by this Court will have to be applied and tested. He would also further contend that classification is a question relating to chargeability and, therefore, the burden of proof lies on the Department, for which no evidence whatsoever has been adduced by the Department to justify the change. It is his submission that any change in the classification has to be based on something more than just change in tariff entry. Even otherwise, if classification is possible under two entries, the one more beneficial to the assessee would be adopted. Hence, relying upon the following judgments he prays for dismissal of the appeal filed by the Revenue:

1. HPL Chemical Ltd. v. CCE 2006 197 ELT Chandigarh 324 (SC)

2. Mauri Yeast India Pvt. Ltd. v. State of U.P. (2008) 5 SCC 680

3. C.G. & S.T. CCE and ST Rohtak v. Som Flavours Masala Pvt. Ltd. - Civil Appeal No.1251 of 2023 disposed of on 17.02.2023.

4. Commissioner of Central Excise, Nagpur v. Shree Baidyanath Ayurved Bhawan Ltd. (2009) 12 SCC 419.

ISSUES/QUESTIONS FOR CONSIDERATION

33. **Questions that arise for our consideration in this group are as under:**

Q.1 Whether the authorities below were correct and justified in invoking the proviso to Section 11A of the CE Act?

Q.2 Whether the product manufactured and cleared by the assessee for the period 01.03.2006 to 10.07.2006 was required to be classified under the CET SH 2403 9910 as *'chewing tobacco'* or to be classified under CET SH 2403 9930 as '*zarda/jarda scented tobacco"*?

DISCUSSION AND FINDINGS

BACKGROUND

34. The assessee herein was availing the benefit of the Notification No.13 of 2002 dated 01.03.2002, issued in exercise of the power under Section 4A of CE Act, whereunder the goods/products were chargeable to a duty of excise with reference to value, notwithstanding anything

contained in Section 4 of CE Act, to be deemed to be the retail sale price declared on such goods, else such amount of abatement, if any, from such retail sale price by classifying the product manufactured as *'chewing tobacco'*.

35. Undisputedly, the assessee was availing the benefit of Notification No.13 of 2002 dated 01.03.2002 and adopting MRP-based assessment. Even after the introduction of 8-digit tariff classification *(w.e.f. 28.02.2005),* the assessee was availing the same benefit. However, in the teeth of two classifications made under Notification dated 24.02.2005, re-organizing the CET SH 2403 9910 as *'chewing tobacco'* and CET SH 2403 9930 as *'zarda/jarda scented tobacco*', which attracted duty of 34% on both the products at the time, the assessee classified or re-classified the product manufactured and hitherto declared as '*chewing tobacco'* to '*zarda/jarda scented tobacco*'. Notification No.2 of 2006 dated 01.03.2006 issued in supersession of Notification No.13 of 2002 excluded '*zarda/jarda scented tobacco'* and did not specify CET SH 2403 9930 for MRP-based assessment, or in other words did not include or did not specify

'*zarda/jarda scented tobacco'* for MRP-based assessment. Hence, the assessee started classifying the product manufactured as *'chewing tobacco'* though he had declared earlier as '*zarda/jarda scented tobacco'*. Thus, by virtue of such deletion/omission in light of Notification No.13 of 2002, the assessment was required to be made under Section 4 which provides for the valuation of excisable goods for purposes of charging of duty of excise. **In other words, the benefits that were flowing from the operation of Section 4A having been excluded by virtue of the Notification dated 01.03.2006**, the assessee reverted to '*chewing tobacco*' to avail the benefit of Section 4A. In the light of the analysis of these notifications vis-à-vis the statutory provisions of the levy of duty or chargeability, it would not detain us for long to answer the questions formulated hereinabove.

RE: Q. No. 1 Issue of Limitation/ Section 11A of the CE Act:

36. In the instant case *i.e.,* Civil Appeal Nos.10159-10161 of 2010 - ***CCE Ahmedabad vs. M/s Urmin Products Pvt. Ltd***. the show cause notice came to be issued on 09.07.2007 and the OIO came to be passed on 28.01.2008 which resulted in the impugned order dated 25.03.2010.

37. The tribunal by the impugned order has held to the following effect:

> "22. In any case, we consider that the limitation would apply in this case and show cause notice should not have been issued beyond one year in view of the fact that the appellant intimated their intention to change. Further, the appellant had also intimated that the proposed change was not in line with the industrial factory. Therefore, the extended period also could not have been applied in this case."

38. It would be apt to note at this juncture itself that the judgment of this Court in ***CCE Vs. Cotspun*** **(1999) 7 SCC 633**, whereunder, it came to be held that levy of excise duty based on an approved classification list is not a short levy and differential duty cannot be recovered on the ground that it is a short levy. It was further held that levy of excise duty based on an approved classification list is the correct levy, at least until the correctness of the approval is questioned by the issuance of a show cause notice to the assessee. It is only when the correctness of the approval is challenged that an approved classification list ceases to be such.

It was further held:

> **"14.** The levy of excise duty on the basis of an approved classification list is the correct levy, at least until such time as to the correctness of the approval is questioned by the issuance to the assessee of a show-cause notice. It is only when the correctness of the approval is challenged that an approved classification list ceases to be such.
>
> **15.** The levy of excise duty on the basis of an approved classification list is not a short levy. Differential duty cannot be recovered on the ground that it is a short levy. Rule 10 has then no application.
>
> **16.** We are, therefore, of the opinion that the judgment in *Ballarpur Industries* which did not advert to Rule 173-B, does not lay down the law correctly and it is overruled. The decision in *Rainbow Industries*, on the other hand, correctly lays down the law. It was delivered in the context of Rule 173-C dealing with approved price lists and the provisions of Rules 173-C and 173-B are analogous."

39. However, the said finding in *Cotspun's* case would not merit acceptance for the simple reason that the amendment to Section 11A of CE Act, brought by Act 10 of 2000, would clearly take within its sweep, that even if there is non-levy or non-payment, short levy or short payment, or erroneous refund, as the case may be, on the basis of any approval, acceptance or assessment relating to the rate of duty or on valuation of excisable goods under any other provisions of the CE Act

or the rules made thereunder, the Central Excise Officer can, within one year from the relevant date, serve a notice on the person chargeable with duty which has not been levied or unpaid or which has been short levied or short paid or to whom the refund has been erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

40. Notification No.2 of 2006 dated 01.03.2006 was issued in supersession of Notification No.13 of 2002 dated 01.03.2002 specifying thereunder the goods covered under Section 4A of Act 1944 for MRP-based assessment. It was noticed that the notification did not specify the goods falling under CET SH 2403 9930 *('zarda/jarda scented tobacco')* but covered the goods falling under CET SH 2403 9910 (*'chewing tobacco'*). Since the '*zarda/jarda scented tobacco'* was not specified under MRP-based assessment under Section 4A of CE Act, the goods had to be assessed under Section 4 of the CE Act. The abatement provided to the goods classified under CET SH 2403 9910 was 50 percent. **Hence, if the goods are cleared as *'chewing tobacco'* the duty has to be paid on lower value resulting in payment of a**

lesser amount of duty, as the value determined under Section 4A after 50 percent abatement was much lesser compared to transactional value under Section 4 of CE Act. It is for this precise reason the assessee changed the classification from '*zarda/jarda scented tobacco*' to '*chewing tobacco'*. '*Zarda/jarda scented tobacco'* was brought into the ambit of Section 4A of the CE Act (MRP-based assessment), by virtue of amendment to Notification No.2 of 2006 *vide* Notification No.16 of 2006 dated 11.07.2006. In other words, '*zarda/jarda scented tobacco'* was not specified for assessment under Section 4A of CE Act for the period **01.03.2006 to 10.07.2006**. In the light of the aforesaid discussion, we are of the considered view the contention of the assessee cannot be accepted and the Revenue was correct and justified in issuing the show cause notice.

41. One of the contentions raised by the assessee throughout has been that they had filed a letter on 30.03.2006 clearly showing the change in the classification by the assessee and the reasons for the change were shown in the statement as well as their letter dated 25.06.2007 and there was no suppression. In fact, the adjudicating

authority has extracted the contents of the letter dated 30.03.2006 in paragraph 13.1 of the OIO dated 28.01.2008. However, for immediate reference and at the cost of repetition it is extracted herein below:

> "This is to inform you that as per the practice followed by our industry, we classified our product; chewing tobacco into CETSH 2403 9910."

42. It is an admitted fact that till the filing of this letter, the assessee continued to classify the product as '*zarda/jarda scented tobacco'* falling under CET SH 2403 9930. It is for this precise reason, that the adjudicating authority has observed, and rightly so that the letter dated 30.03.2006 had been cleverly drafted and it does not mention in detail the product which they were manufacturing at that material time namely *'zarda/jarda scented tobacco'*. Though the classification in the letter shows entry CET SH 2403 9910 *('chewing tobacco')*, it would depict a picture as though it is a new product. A plain reading of the letter would not indicate that the author of the said letter intended to reveal any details about the product that is being manufactured. However, the assessee cannot feign ignorance as to the necessity of furnishing such relevant details necessary for determination of payment of duty. The

assessee having been in this industry for a long period was well aware of this statutory requirement. Upon a deeper examination of the said letter, the suppression becomes more apparent, namely the non-mentioning of change of the name and classification of the goods which they were currently manufacturing and which they ought to have disclosed. It would be apposite to note the judgment of this court in ***Continental Foundation Jt. Venture v. Commissioner of Central Excise (2007) 10 SCC 337*** that suppression means failure to disclose full information with intent to evade payment of duty. It has been further held:

> "12. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.
> 14. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned,

> they are clearly qualified by the word 'wilful', preceding the words " misstatement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.' Therefore, there cannot be suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Misstatement of fact must be wilful."

It is this hiding of the fact and not specifying the details in their letter that led to the issuance of the show cause notice and invocation of Section 11A and Section 11 AC of the CE Act, by the Department. It cannot be ignored that till filing of the letter dated 30.03.2006, the assessee itself was classifying the product as '*zarda/jarda scented tobacco'* falling under CET SH 2403 9930 and being a large-scale manufacturer and paying large sums of amount as duty, to contend that it was unaware of the difference between these two products, or to contend that it had classified the product as '*zarda/jarda scented tobacco*' by ignorance, is not a plausible justification on part of the assessee. However, on the issuance of Notification No.2 of 2006 dated 01.03.2006 under which '*zarda/jarda scented tobacco*' was excluded or

in other words not included in the said notification, the assessee changed the description of its product from '*zarda/jarda scented tobacco*' to *'chewing tobacco'*. The date of communication of the letter dated 30.03.2006 by the assessee also acquires significance in as much as the Notification No.2 of 2006 dated 01.03.2006 were to take effect from 01.04.2006 and just two days before the date of the said Notification No.2 of 2006 coming into effect, this communication dated 30.03.2006 has been forwarded to the Department by the assessee. The intention of springing up such a letter is evident from the fact that intention was to evade payment of duty payable under Section 4 of CE Act; despite knowing the fact that its product was not covered under relevant notification which provides for valuation under Section 4A, yet the assessee did so, only to pay duty on lower value as per Section 4A of CE Act, by claiming the product manufactured by it as *'chewing tobacco'* rather than *'zarda/jarda scented tobacco'* to avail benefit of MRP-based assessment which was lower than the value as prescribed under Section 4 of the CE Act.

43. Yet another factor which cannot go unnoticed is the statement of the production manager and factory in-charge and manager recorded at the time of the inspection of the units/factory of the assessee, whereunder they have clearly admitted in their statement dated 21.06.2007 recorded under Section 14 of the CE Act, wherein they confirmed that in the E.R. 1 returns filed for the month of April 2006 onwards, they have revised the classification of their final product from CET SH 2403 9930 to CET SH 2403 9910 and started describing their product as *'chewing tobacco'* instead of '*zarda/jarda scented tobacco'* and by virtue of such declaration they continued to pay duty as per MRP-based assessment under the relevant Notification No.2 of 2006 dated 01.03.2006 though *'zarda/jarda scented tobacco'* was not covered under MRP-based assessment during the period **01.03.2006 to 10.07.2006** till the tariff entry *i.e.,* CET SH 2403 9930 being brought within the ambit of Section 4A of CE Act by issuance of Notification 16 of 2006 dated 11.07.2006. It is for this precise reason that the act of the assessee was held to be a deliberate and accordingly wilful misstatement was alleged on part of the assessee, with an intention to evade duty payable under Section 4 of the CE Act, which would attract

the extended period of limitation, namely proviso to Section 11A (1) being invoked. The adjudicating authority has examined the issue of invoking an extended period of limitation, in the background of the communication dated 30.03.2006 which has been very heavily relied upon by the assessee to stave off the allegation of misrepresentation or wilful misstatement of facts and the adjudicating authority opined as under:

> "It can be seen that the assessee had very cleverly drafted the letter and did not mention any details of the product which they were manufacturing at that material time i.e.,'Jarda scented tobacco'. On reading this letter, any person could conclude that they have started a new product 'Chewing tobacco' which they have classified in 2403 9910 as it is the, correct subheading of Chewing tobacco. On a plain reading of the letter, at the first instance, no one will be able to understand the real motive. The assessee did not mention in the letter that they are changing the name and classification of the goods which are currently being manufactured by them which they were supposed to do. Had they mentioned this fact at that time, the issue would not have arisen at all. Intentionally, they have hidden the facts and did not elaborate in the letter. The assessee, on the contrary preferred to show the reasons in the statement recorded under Section 4 on 26-6-2006 when the department caught him for evading the duty. Further, the assessee has mentioned that as per the practice followed by their industry, they classify their product Chewing tobacco into 2403 9910. The classification of the goods manufactured by an assessee is based on many factors including the raw material used, manufacturing process and the end use. If any of the deciding factors is changed then the classification may change and therefore the industry cannot decide the classification in such type of goods. The assessee intentionally hid the fact that they have changed the classification of their product viz. 'Jarda scented tobacco'. It is

> an establish fact that when there is no dispute on classification and the assessee suddenly submits a very carefully drafted letter of such type, a general inference will be drawn that a new product has been introduced in place of earlier one. The assessee, with intent to evade the Central Excise duty, deliberately resorted to mis-statement and willfully suppressed the vital facts. The assessee had changed and misclassified the product from 'Jarda scented tobacco' to 'Chewing tobacco' with an intention to evade payment of duty payable under Section 4 of the Central Excise Act, 1944, despite knowing the fact that their product was not covered under the relevant Notification which provides for valuation under Section 4A. The assessee did so to enable them to pay duty on lower value [as the value as per Section 4A of Central Excise Act, 1944 (MRP based assessment) was lower than the value as per Section 4 of Central Excise Act, 1944. Thus, there was a deliberate intention to evade payment of duty by the assessee, by misclassification and willful mis-statement of their product and due to this act, the department is entitled to invoke the extended period as provided in the proviso to Section 11A (1) of the Central Excise Act, 1944 to recover the differential duty along with interest under section 11 AB for the larger period upto 5 years and has also rendered themselves liable to penalty under section 11 AC of the Central Excise Act 1944. I, accordingly hold that the assessee is liable to penalty under Section 11AC of the Central Excise Act, 1944."

However, the tribunal has proceeded to hold that limitation would apply and show cause notice should not have been issued beyond one year in view of the fact that the assessee intimated their intention to change – *vide* Paragraph 22 of the impugned order, without addressing the aforesaid issues which has been dealt in detail hereinabove. In other words, the tribunal by cryptic order has negatived the contentions of the

Revenue and held that the invocation of the extended period of limitation was not warranted. This finding, not being in consonance with the facts obtained on the hand, we are unable to subscribe our views to the judgment of the tribunal. In that view of the matter, we are of the considered view that Question No.1 is to be answered against the assessee and in favour of the Revenue and affirm the finding of the adjudicating authority and reverse and/or set aside the finding recorded by the tribunal which has been observed at the initial stage herein given that it is not only contrary to the facts but also contrary to law as noticed hereinabove. It is for these precise reasons the Adjudicating Authority was of the clear view that there has been a deliberate intention to avoid payment of duty by the assessee by misclassification and willful misstatement of its product and hence it was justified in invoking the extended period as provided in the proviso to Section 11A(1) of CE Act, 1944.

RE: Q.2 – WHETHER ASSESSEE'S CLASSIFICATION FOR THE PERIOD IN DISPUTE IS TO BE ACCEPTED?

44. In the instant case the principle of admission is the best proof that can be applied to conclude that the assessee itself had classified the product as '*zarda/jarda scented tobacco'* based on the declaration in ER-I returns for April 2006 and onwards. On advent of 8-digit era under the CETA, '*chewing tobacco*' was classified under CET SH 2403 9910, and '*zarda/jarda scented tobacco'* came to be separately classified under CET SH 2403 9930 from 01.03.2005 despite such classification, the notification issued in respect of goods to be assessed on the basis on MRP continued to show the tariff heading and the goods covered under '*chewing tobacco*' head as 2404.41. When Notification No.2 of 2006 dated 01.03.2006 came to be issued and it reflected under Serial No.28 that all goods classified under entry SH 2403 9910 to 2403 9920 were covered for MRP assessment and the product '*zarda/jarda scented tobacco'* was not included under said entry, it necessarily meant that *'zarda scented tobacco'* could not be determined under MRP assessment scheme.

45. The signatory to the ER – 1 returns filed by the assessee for the relevant period was Smt. Sheetal K Majithia, Director – Finance and she was the one who took the decision to change the classification of the product. Hence, she was issued with the summons for appearing and explaining the same. However, she chose to ignore the summons and has not appeared before the adjudicating authority. Whereas, the factory in-charge and manager, Shri Dipak S Shah, has appeared and has furnished the statement, whereunder he admits that he reports to Smt. Sheetal K Majithia, Director – Finance. He further admits in his statement dated 26.06.2007 and 09.07.2007, that their/assessee's product is classifiable as '*jarda/zarda scented tobacco*,' they still continued to pay duty as per MRP-based assessment prescribed under Section 4A of the CE Act. He further admits at the material time 2005-06, the product manufactured by them was described as '*jarda/zarda scented tobacco'* and was known and sold in the market as '*jarda/zarda scented tobacco'*, which was also described in their invoices accordingly. He has categorically admitted in his statement that from April 2006 onwards the assessee started describing their product as '*chewing tobacco*' for availing the benefit of Notification of 2 of 2006

dated 01.03.2006, which undisputedly did not continue to reflect '*jarda/zarda scented tobacco'*. In this background, when the communication dated 30.03.2006 to the Department intimating the change of classification is perused, it would indicate the details of the products which was being manufactured was not specified in the said communication at all. In that view of the matter, the communication relied upon by the assessee would pale into insignificance. `

46. The label of the product manufactured by the appellant is *"Baghban Zafrani Zarda"* and below the label it is indicated as *"flavoured chewing tobacco."* It has been the consistent stand of the assessee that the expression "*zarda/jarda*" in the tariff entry is different from the term "*zarda/jarda*" used by the appellant. It is nobody's case that there was a change in the label or manufacturing process from the six (6) digit era to the eight (8) digit tariff era. The tribunal itself seems to have been in dilemma and has been swayed by the fact that no expert opinion had been obtained by the Department for classification. This situation would not arise at all for reasons more than one, ***firstly***, the assessee itself right from the beginning has been consistently declaring

the product manufactured by it as *'chewing tobacco'* till the 8-digit regime in 2005 (w.e.f. 24.02.2005) sub-classified the entries as *'chewing tobacco'* and '*zarda/jarda scented tobacco'*. In the ER-I returns filed from March 2005 till April 2006 *i.e.,* after the sub-classification, the assessee mentioned the description of the product as '*zarda scented tobacco*' and from April 2006 reclassified it as *'chewing tobacco'***.**

47. At the cost of repetition it requires to be noticed that the Notification No. 2 of 2006 dated 01.03.2006 was issued in supersession of Notification 13 of 2002 dated 01.03.2002 specifying the goods covered under Section 4A of the CE Act, for MRP based assessment. The said notification did not specify the goods falling under CET SH 2403 9930, *i.e.,* '*zarda/jarda scented tobacco'*, but it covers the goods falling under CET SH 2403 9910 *i.e.,* '*chewing tobacco*'. Thus zarda/jarda *scented tobacco* not having been specified under MRP-based assessment under Section 4A of the CE Act, the goods had to be necessarily assessed under Section 4 of the CE Act. The assessee being aware that there being no change in the nature of the products, its

ingredients and also the manufacturing process had changed and misclassified the product as '*chewing tobacco*' from '*zarda/jarda scented'* tobacco. Had the assessee continued its classification as '*zarda/jarda scented tobacco'*, the duty payable as per transaction value under Section 4 of the CE Act would have been much more than the determination under Section 4A of CE Act after 50 % abatement. It is for this precise reason for avoiding and evading payment of the higher duty, the classification was deliberately changed from *'zarda/jarda scented tobacco'* to *'chewing tobacco'*.

48. The reliance placed by the assessee on Board's letter dated 23.06.1987, trade notice dated 15.07.1997 and Notification dated 16.03.1995, would have no impact or bearing on the facts of the present case/group, since they were issued during the era of 6-digit tariff classification being imposed. As noticed by us above, the tariff entry having been realigned to 8 digits and there being a specific sub-heading being provided and two competing products namely – '*chewing tobacco*' and *'zarda/jarda scented tobacco'* having been separately

classified, the aforesaid circular/notifications relied upon by the assessee would not come to rescue of the assessee.

49. It is trite law that when specific entry is found in a fiscal statute, the same would prevail over any general entry. If there are two or more sub-headings, the heading which provides the most specific description will have to be preferred to a heading providing a more general description.

In the light of the aforestated discussion we are of the considered view that classification of the product as adjudicated by the authority deserves to be accepted and finding recorded by the tribunal deserves to be set aside and consequently allow these appeals. Thus, both the points formulated hereinabove in this group is answered in favour of the Revenue and against the asessee.

II. COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH V. M/S. FLAKES-N-FLAVOURZ [C. A. 5146/2015]

50. In the instant group, the Revenue is in appeal assailing the order passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), New Delhi dated 20.02.2014 by the jurisdictional tribunal.

BRIEF FACTS

51. The respondent-assessee is the manufacturer of *zarda*, pan *chatni* and scented *supari* falling under the category of excisable goods under the CETA, and was clearing its product *'Gopal Zarda'* under CET SH 2403 9910 as *'chewing tobacco'* and paid excise duty based on retail sale price under section 4A of the CE Act, (hereinafter to referred as "CE Act"). During the audit, it was found that the assessee's product merits classification under CET SH 2403 9930 as *'Zarda/Jarda scented Tobacco'*. On redetermination of value under section 4 of the CE Act it was found that the assessee has short-paid excise duty by Rs. 4,28,65,508/- and accordingly, a show cause notice came to be issued under section 11A of the CE Act. The Commissioner of Central Excise,

in his OIO dated 02.04.2008 confirmed the demand of duty, interest, penalty and held that the product manufactured by the respondent-assessee falls under CET SH 2403 9930 as *'Zarda/Jarda scented tobacco'* by concluding that assessment has to be made under section 4 of the CE Act. An appeal was preferred against the said order before the CESTAT which came to be allowed and the OIO dated 02.04.2008 was set aside.

SUBMISSIONS OF THE PARTIES

52. We have heard the learned advocates appearing for the parties.

53. Ms. Nisha Bagchi learned counsel appearing for the Department has supported the OIO dated 02.04.2008 while contending that the tribunal committed an error in setting aside the said findings and in holding that the product in question was classifiable as *'chewing tobacco'* under CET SH 2403 9910 and rejecting the stand of the department that same should be classified as *'zarda/jarda scented tobacco'* under CET SH 2403 9930. She would contend that the tribunal

erred in relying upon its findings recorded in ***M/s Urmin Products Private Limited*** which undisputedly is under challenge before this Court in Civil Appeal No. 10159-161 of 2010 (Group I) and as such it ought not to have relied upon the said judgment. She would also contend that the tribunal erred in not considering the fact on 15.02.2007 Shri Manoj Gupta, partner of the appellant, he has admitted that perfumery compounds are added to the raw tobacco and as such product is to be classified under CET SH 2403 9930 as *'Zarda/Jarda scented tobacco'* and not *'chewing tobacco'*.

54. She would contend that prior to CETA (Amendment), 2004 came into force on 28.02.2005, '*chewing tobacco'* and its preparations were covered under chapter 2404.41 and after the amendment the said chapter heading was classified into three separate tariff items within the chapter heading 2404 namely, '*chewing tobacco'*, preparations containing '*chewing tobacco'* and '*zarda/jarda scented tobacco'* and would contend all these three items were earlier classified collectively under chapter heading 2404.41 and the classification as it exists today clearly suggests that '*chewing tobacco'* is not

scented/flavoured/perfumed tobacco and both the disputed items fall under different and distinct classes of products. She would also submit that the assessee themselves admit that their product is '*zarda/jarda'* and even the packed pouches bear printed description of their contents as *'Gopal Zarda'*. Reiterating the contentions raised, grounds urged and pleas put forward Civil Appeal No. 10159-161 of 2010 *(M/s Urmin Products Private Limited)*, she prays for allowing this appeal.

55. Per contra, Mr. Vivek Kohli, learned senior counsel, appearing for the respondent has reiterated the contentions raised and grounds urged before the tribunal. He would contend that throughout the period before dispute, during the disputed period and even after the disputed period, the product manufactured by the assessee was classified as '*chewing tobacco/ flavoured chewing tobacco'*. Even the ER-1 returns and weekly online returns filed by the assessee classifying the product as '*chewing tobacco'* were accepted by the Revenue without any objection. He would contend that even after introduction of 8-digit tariff for full one year *i.e.,* from 1.03.2005 to 28.02.2006, the assessee classified its product under tariff entry number 2403 9910 and

discharged its tax liability under Section 4A of CE Act, which was accepted with full knowledge by the Revenue and raising objection during audit of the unit for the period 1.03.2006 to 11.07.2006 is possibility of higher Revenue during this period is due to (a) technical oversight by the Revenue itself which was later corrected and, (b) the alternate assessment on transaction value rather than MRP based assessment. He would contend that when classification of the product is accepted earlier and for the subsequent period, same cannot be classified differently. There being no definition of the competing products, the application of the common parlance test is to be adopted and when so adopted the only conclusion that has to be drawn is that product is to be construed as '*chewing tobacco'*, as declared in invoices and understood by distribution chain of dealers, stockists, retailers and consumers. He would submit that burden of proof lies on the Revenue as classification is a question relating to chargeability and the same having not been discharged by adducing any evidence whatsoever the classification as done by the adjudicating authority has been right set-aside by the tribunal.

56. He would submit that the Revenue is seeking to impose classification wherein the word 'perfumery' to impart flavour to '*chewing tobacco'* has the basis and the fact remains the very same process is adopted since decades. Based on uncorroborated statement the classification cannot be done. To conclude he would contend that as opined that this court in ***W.P.I.L. v. CCE Meerut – 2005 (181) ELT 359*** has opined that during transition phases inadvertent mistakes have to be interpreted/ understood in the light of or in the context of policy prevailing in respect of the product and the policy then existing was to tax tobacco products under Section 4 A of the CE Act – MRP based assessment, it is only logical that classification declared by the assessee and declared by the department prevail. Hence, he prays for dismissal of the appeal by relying upon the following judgments.

i. HPL Chemicals Limited v. CCE Chandigarh. 2006 (197) ELT 324 (SC)
ii. Mauri Yeast India Private Limited v. State of UP. 2008 (225) ELT 321 (SC)
iii. C.G. and S.T. CCE and S.T., Rohtak v. Som Flavour Masala Private Limited
iv. CCE, Nagpur v. Shree Baidyanath Ayurved Bhawan. 2009 (237) ELT 225 (SC)
v. W.P.I.L. Limited v. CCE, Meerut. 2005 (181) ELT 359 SC.

DISCUSSION AND FINDINGS

57. The period involved in the present appeal pertains to **01.03.2006 to 10.07.2006.** During the audit of the accounts of the assessee, the department noticed that the assessee was manufacturing *'zarda/jarda scented tobacco'* and was claiming it as *'chewing tobacco'*. The stand of the assessee has been that they were manufacturing varieties of flavoured '*chewing tobacco'*. Hence, the statement of the partner of the assessee came to be recorded on 15.02.2007, which has been noticed in paragraph 3 of show cause notice dated 30.03.2007. Hence, we do not propose to extract the same. A perusal of the said statement would indicate the manner in which the product has been manufactured. It is admitted in the statement given by the partner of the assessee, that raw tobacco is mixed with an additive mixture which is manufactured by mixing perfumery compounds received from the noticee's Delhi Unit itself. He also admits that to this perfumery mixture, further compounds are added for making various types of tobacco to be manufactured. Based on this statement and precisely for the reason that the product manufactured by the assessee seems to not be '*chewing tobacco'*,

aforesaid show cause notice dated 30.03.2007 came to be issued by calling upon the assessee to show cause as to why the short-paid duty amounting to Rs.4,28,65,508/- should not be recovered. The said show cause notice came to be adjudicated and the Commissioner confirmed the said demand.

58. Being aggrieved by the order dated 02.04.2008 passed by the Commissioner, appeal before the tribunal was filed and as already noticed hereinabove, there were divergent views of the Member (Judicial) and Member (Technical). The judicial member **at paragraph 16 of the order** held that the appellant (assessee) had properly classified it as *'chewing tobacco'* under CET SH 2403 9910 and applying the principles laid in *M/s Urmin Products Private Limited (which is the subject matter of Civil Appeal No. 10159-161 of 2010)* allowed the appeal whereas the technical member disagreed with the said view and held that the product manufactured by the appellant-assessee is to be classified as *'zarda/jarda scented tobacco'* under CET SH 2403 9930 and should be assessed under the provision of Section 4 of CE Act, for the relevant period and with effect from 11.07.2006 under Section 4A

when specific Notification No.16/2006 dated 11.07.2006 came into force.

59. In the light of the difference of opinion the matter came to be referred to the opinion of a third member who concurred with the view expressed by the judicial member and held that the product manufactured by the petitioner was '*chewing tobacco'* and not '*zarda/jarda scented tobacco'* as claimed by the Revenue.

60. It is pertinent to mention that the issue concerning classification has been discussed by us herein above in the matter of *Commissioner of Central Excise, Ahmedabad Vs. M/s Urmin Products Private Limited and Others* and findings recorded by us in paragraph no.(s) 46,47,48 and 49 supra would be squarely applicable to the facts on hand.

61. Undisputedly, the tribunal as noticed herein above has relied upon the view expressed in *M/s Urmin Products Private Limited* by it to arrive at a conclusion that the product is to be classified as '*chewing tobacco*'.

62. It is no doubt true that in the instant case, the assessee duly has been declaring the product manufactured by it as '*chewing tobacco'*. However, the fact remains that there was no issue till the Six-digit tariff era which was revoked with the introduction of the Eight-digit tariff head. Pursuant to the same the entry was reorganized and reclassified as '*chewing tobacco'* (2403 9910), a preparation containing the *'chewing tobacco*' (2403 9920) and '*zarda/jarda scented tobacco'* (2403 9930). Circular No. 808/5/2005-CX dated 25.02.2005 came to be issued whereunder **classification was given** that the subsisting notification having a six-digit enumeration should be read in terms of the eight-digit of the new Central Excise Tariff. On 01.03.2006, Notification No. 02/2006 came to be issued by virtue of which a Notification No. 13/2002 dated 01.03.2002 was superseded. Thus, the list of products with their respective chapter headings/sub-headings, which were to be covered under the MRP-based assessment in terms of Section 4A of the CE Act, was notified in terms of an Eight-digit tariff. In the said notification '*zarda/jarda scented tobacco*' was left out or was not included for MRP-based assessment. Subsequently, by clarificatory Notification No. 16/2006 dated 11.07.2006, the product '*zarda/jarda*

scented tobacco' was brought back within the MRP-based assessment benefit. Thus, the burning issue would be between the period **01.03.2006 to 11.07.2006** which in the instant case relates to 01.03.2006 to 10.07.2006.

63. In the instant case, the facts do not disclose there being a change in the declaration of the product manufactured by the present respondent herein, as was in the case with *M/s Urmin Products Private Limited.* Even otherwise by virtue of the change from Six-digit tariff to Eight-digit tariff era and during the period 01.03.2006 to 11.07.2006. Though the generic word '*chewing tobacco'* including preparation commonly known as "*khara masala, quiwam, dhokta, zarda, sukha, surti"* or *"chewing tobacco and preparation containing chewing tobacco"* got bifurcated or took its new birth by virtue of which the said entry was re-organised and classified under three headings namely *'chewing tobacco'* (2403 9910), *'preparations containing chewing tobacco'* (2403 9920) and '*zarda/jarda scented tobacco'* (2403 9930), the heading '*zarda/jarda scented tobacco*' did not find a place in the corresponding Notification No. 02/2006 dated 01.03.2006 and thereby

the '*zarda/jarda' scented tobacco* got excluded from the preview of the Notification No. 02/2006 and the benefit of the assessment in terms of Section 4A was no more available for the product *'zarda/jarda scented tobacco'* or in other words the manufacturers of *'zarda/jarda scented tobacco'* were required to be assessed under Section 4 of CE Act. On account of this there was a huge gap in the central excise duty leviable under Section 4 of the CE Act, which would obviously be the heartburn for the taxpayers which resulted in the above-noticed tug of war between the Revenue and the assessee, wherein the assessee contended the products manufactured by it though scented or flavoured still continued to be *'chewing tobacco'* and it did not partake the character of the *'zarda/jarda scented tobacco'*. For finding an answer to this question, apart from the finding recorded in *M/s Urmin Products Private Limited's case*, we deem it appropriate to note that the general rules for the interpretation of the goods are traceable to provisions of the CETA under the chapter heading *"general rules for the interpretation this schedule"*. Presuming for a moment that where goods are *prima facie* classifiable under two or more headings (by accepting the proposition of the assessee) it raises a serious doubt with

regard to the classification of the product. In such circumstances, section 2 of the CETA, 1985 provides that the rates at which duties of excise shall be leviable under the CE Act, are specified in the first and second schedules. The first schedule contains a set of rules known as *"general rules for the interpretation of this schedule"*. These rules begin with a mandate that the classification of goods in this schedule shall be governed by the following principles laid thereunder. This rule had received interpretation of this Court in the matter of ***Westinghouse Saxby Farmer Ltd. v. Commissioner of Central Excise, Calcutta, (2021) 5 SCC 586*** whereunder it came to be held as follows:

> **"26.** Rule 1 of these Rules makes it clear that "the titles of Sections, Chapters and Sub-Chapters are provided for ease of reference only and that for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and provided such headings or Notes do not otherwise require, according to the provisions of the rules that follow".
>
> **27.** Rule 2 deals with (*i*) incomplete or unfinished articles; and (*ii*) mixtures or combinations of material or substance. While Rule 2(*a*) deals with incomplete or unfinished Articles, Rule 2(*b*) deals with mixtures or combinations of a material or substance.
>
> **28.** Rule 3 deals with cases where goods are classifiable under two or more sub-headings. But Rule 3 begins with a reference to Rule 2(*b*). Therefore, it is necessary to extract Rule 2(*b*) and Rule 3 together. They read as follows:

"**2. (*a*)*****

(*b*) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

3. When by application of Rule 2(*b*) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(*a*) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(*b*) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to clause (*a*), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(*c*) when goods cannot be classified by reference to clause (*a*) or clause (*b*), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

64. On the strength of the inputs used in the manufacture of the disputed product and the end product which is sought to be classified as

'chewing tobacco' by the assessee and *'zarda/jarda scented tobacco'* by the Revenue, results in the moot question, as to what test is to be adopted namely, whether sole or principal usage test is to be applied? This Court in *Westinghouse Saxby Farmer Ltd.'s case (supra*) had an occasion to deal with similar issues and took note of the earlier dicta of this Court rendered in ***A. Nagaraju Bros. v. State of A.P., 1994 Supp (3) SCC 122*** and held there is no 'one' single universal test in this matter.

65. Keeping these aspects in mind when the facts on hand are perused it would disclose the product manufactured by the assessee-respondent is sold as *'Gopal zarda'* and both the members of the tribunal namely, technical members and judicial members are *ad idem* on the issue of the manufacturing process of the goods and the product in question namely, they all agree that tobacco flavouring substance is added and the judicial member has clearly held that the product is marketed as ***"flavoured chewing tobacco".*** This addition of scent or flavour in the '*chewing tobacco*' was contended to be *'zarda/jarda scented tobacco'* by the Revenue, whereas the assessee has taken a stand that by addition of the

scent or flavour, it would not partake the character of the *'zarda/jarda scented tobacco'* but continues to be '*chewing tobacco'*. In this background, the difference between *'chewing tobacco'* and *'zarda/jarda scented tobacco'* if attempted to be ascertained from the definition found in the glossary of Bureau of Indian Standards, particularly in terms of definition and preparation, it is classified as under:

> **"2.27 'Chewing Tobacco'-** Chewing tobacco, as its name suggests is a tobacco preparation for chewing purpose, also taken with *paan* (betel leaf). *Gutka, surti, zarda, quiwam and dokta* are some of the different types of chewing tobacco preparations.
>
> **2.184 'Zarda'-** A chewing tobacco product made of highly scented and flavoured tobacco flakes. Chewed along with betel nut and *paan* (betel leaf)."

66. A careful perusal of the meaning allocated to the concerned products, '*Chewing Tobacco'* and '*Zarda*' leads to formulation of the following distinction based on the different parameters as under:

> **"Preparation and Form**
>
> **Chewing Tobacco:** Chewing tobacco typically comes in loose leaf or twist form. It consists of cured and fermented tobacco leaves. Chewing tobacco is usually taken by placing a portion of it between the cheek and gum, where it releases nicotine over time as it's slowly chewed.

Zarda Tobacco: Zarda, on the other hand, is a specific type of chewing tobacco that is finely chopped or shredded and highly scented and flavoured. It is often sweetened and can be brightly coloured. Zarda is known for its strong and distinct aroma and flavour. It is often consumed by placing it in the mouth, similar to other chewing tobacco products, and is sometimes chewed along with betel nut and paan.

Flavour and Aroma

Chewing Tobacco: Chewing tobacco can come in various flavours, but it may not always be as strongly scented or flavoured as Zarda. The flavours can range from natural tobacco flavours to menthol, wintergreen, or other fruit and spice flavours.

Zarda Tobacco: Zarda is specifically known for its highly scented and flavoured nature. It is often infused with strong spices and sweeteners, giving it a distinct and potent aroma and taste. The flavours in Zarda are often more pronounced and intense compared to regular chewing tobacco.

Use with Betel Nut and Paan

Chewing Tobacco: While chewing tobacco can be used alongside betel nut and paan, it is not exclusive to this combination. Chewing tobacco can be used independently as well.

Zarda Tobacco: Zarda is more commonly associated with being used in combination with betel nut and paan. This combination is often considered a traditional practice in some South Asian cultures."

67. At this juncture, it may be relevant to draw a distinction between the facts of the instant case and the facts in the case of *Urmin* supra. In the present factual scenario, there has been a consistent and clear

classification provided by the assessee, which was accepted by the Revenue, prior to the dispute arising from the audit objection raised by the concerned assessing officer.

68. Unlike the facts as narrated above in Group I, *i.e., Urmin,* whereunder the assessee therein had sought to change the classification of the goods manufactured by them, particularly when there was a difference in the duty, and a much higher duty was required to be paid by the assessee. Whereas in the instant case on hand, there has been no change in classification of the product which was sought by the assessee. It is settled law that the onus/burden of proof for change in classification of the product lies on the Department, particularly when it wishes to challenge a long-accepted classification. This court in the case of ***HPL Chemicals Limited Vs. CCE, Chandigarh: 2006 5 SCC 208*** while discussing the onus/burden of proof in matters of chargeability held as follows:

> "28. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce

proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue. On the one hand, from the trade and market enquiries made by the Department, from the report of the Chemical Examiner, CRCL and from HSN, it is quite clear that the goods are classifiable as "denatured salt" falling under Chapter Heading 25.01. The Department has not shown that the subject product is not bought or sold or is not known or is dealt with in the market as denatured salt. The Department's own Chemical Examiner after examining the chemical composition has not said that it is not denatured salt. On the other hand, after examining the chemical composition has opined that the subject-matter is to be treated as sodium chloride."

29. It has been held by this Court in a number of judgments that the burden of proof is on the Revenue in the matter of classification. In *Union of India* v. *Garware Nylons Ltd.* [(1996) 10 SCC 413] in para 15 this Court held as under: (SCC pp. 419-20)

"15. In our view, the conclusion reached by the High Court is fully in accord with the decisions of this Court and the same is justified in law. The burden of proof is on the taxing authorities to show that the particular case or item in question is taxable in the manner claimed by them. Mere assertion in that regard is of no avail. It has been held by this Court that there should be material to enter appropriate finding in that regard and the material may be either oral or documentary. It is for the taxing authority to lay evidence in that behalf even before the first adjudicating authority. Especially in a case as this, where the claim of the assessee is borne out by the trade enquiries received by them and also the affidavits filed by persons dealing with the subject-matter, a heavy burden lay upon the Revenue to disprove the said materials by adducing proper evidence. Unfortunately, no such attempt was made. As stated, the evidence led in this case conclusively goes to show that nylon twine manufactured by the assessee has been treated as a kind of nylon yarn by the people conversant with the trade. It is commonly considered as nylon yarn. Hence, it is to be classified under Item 18 of the Act. The Revenue has failed

> *to establish the contrary. We would do well to remember the guidelines laid down by this Court in Dunlop India Ltd. v. Union of India [(1976) 2 SCC 241 : AIR 1977 SC 597] in such a situation, wherein it was stated: (SCC p. 254, AIR p. 607, para 35)*
>
> *'When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause.' "*

69. Given the circumstances in the present case, the Department has not provided any sufficient evidence before this Court determine the nature, characteristics, contents, and composition of the product in order to adjudicate the present dispute purely on the issue of classification and hence no attempt can be made to determine the appropriate entry of classification for the product manufactured by the assessee at the relevant period of time of the dispute. The Revenue has also not raised any specific grounds in relation to any wilful misstatement with an intention to evade duty on part of the assessee, as opposed to the case of *Urmin* wherein one of the main grounds urged was the intention to avoid payment of duty. It is pertinent to mention that there is a specific observation made by the Commissioner in his OIO dated 30.03.2007 that no wilful suppression is attributable to the

assessee, and placing reliance on this very observation, the tribunal had also set-aside the penalty imposed upon the assesssee. It may be noted that this court in the case of ***CCE vs. Damnet Chemicals Private Ltd. (2007) 7 SCC 490*** had held***:***

> "26. In the circumstances, we find it difficult to hold that there has been conscious or deliberate withholding of information by the assessee. There has been no wilful misstatement much less any deliberate and wilful suppression of facts. It is settled law that in order to invoke the proviso to Section 11-A(1) a mere misstatement could not be enough. The requirement in law is that such misstatement or suppression of facts must be wilful. We do not propose to burden this judgment with various authoritative pronouncements except to refer the judgment of this Court in Anand Nishikawa Co. Ltd. v. CCE [(2005) 7 SCC 749 : (2005) 188 ELT 149] wherein this Court held : (SCC p. 759, para 27)
>
> "27. … we find that 'suppression of facts' can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression."
>
> (emphasis supplied)
>
> 27. It is clear from the material available on record that the Excise Authorities had inspected the manufacture process, collected the necessary information and details from the respondent assessee and even collected the samples and sent for chemical analysis. The authorities were aware of the tests and analysis reports of the products manufactured by the respondent assessee. The relevant facts were very much

> within the knowledge of the Department authorities. The Department did not make any attempt to lead any evidence that there was any wilful misstatement or suppression of facts with intent to evade payment of duty."

70. Classification is a question relating to "chargeability". It is well settled law that insofar as chargeability is concerned, the burden of proof lies on the Revenue and not on the assessee. In the facts obtained in the present case, no evidence of whatsoever nature has been placed by the Revenue to raise any presumption. In fact, the entire proceedings are based upon "audit objection" and the Revenue attempts to rely upon the additives to the '*chewing tobacco'* as the basis for arriving at a conclusion, that assessee had cleared the *'jarda/zarda scented tobacco'* which is not even supported by the samples drawn or inquiry made from the traders or consumers or stockist, suppliers and buyers. In the absence of iota of material, the finding of the tribunal cannot be displaced. It would be of benefit to extract the finding recorded by the third member of the tribunal, who upheld the finding of the judicial member and it reads:

> "9 In the tariff the expression xxxx practice. In the present case, as the product is flavour chewing tobacco and it is bought and sold in the market as chewing tobacco. Further the appellant from the beginning classifying the same as

> chewing tobacco and after the period in dispute also classified the same as chewing tobacco. Hence I find merit in the contention of the appellant that the product in question is chewing tobacco and classifiable under Heading 24039910 of the Tariff."

71. Upon anxious consideration of the aforestated facts, coupled with lack of cogent evidence for the purpose of determination of the classification entry with respect to the product manufactured by the assessee, **we deem it necessary to not interfere with the findings of the tribunal in light of the settled judicial findings of this Court which directly have a bearing on the facts of the present case.**

72. At the cost of repetition, we would further like to reiterate that the observations and findings recorded in this group are exclusive to the peculiar facts of this case only. Thus, appeal filed by the Revenue deserves to be dismissed.

III. COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX EXCISE AND CUSTOMS BHOPAL V. KAIPAN MASALA PVT. LTD. DIARY NO. 44912/2019 AND 6888/2020

73. Two Appeals *i.e.,* Diary No. 44912 of 2019 and Diary No. 6888 of 2020 are the subject matter of this group whereunder the Revenue is in appeal challenging the order of the jurisdictional CESTAT dated 14.11.2018 passed in Excise Appeal Nos. 50468, 50469, 50470, 50471, 57472, 51319 and 51978 of 2018.

BRIEF FACTS

74. Before adverting to the facts of the present group it may be noticed that with effect from 01.03.2015, the capacity of production per packing machine per month and rate of duty for '*chewing tobacco'* and '*Zarda/jarda Scented Tobacco*' was amended *vide* Notification No. 4/2015 and Notification No. 5/2015-C.E. (N.T.), respectively and the duty for *'chewing tobacco'* was prescribed differently as compared to '*Zarda/Jarda scented tobacco*' as already noticed herein above. The respondent-assessee *vide* their communication letter dated 18.03.2015

intimated to the jurisdictional competent authority that the product manufactured by them is only '*scented zarda/jarda tobacco'* which is different from *'chewing tobacco.'* They also informed that the nomenclature of *'chewing tobacco'* is being used as there was no difference in the capacity of production as well as the rate of duty before the budget of 2015-16. In response to the said letter of the assessee, the Range Superintendent *vide* his letter dated 19.03.2015 requested the assessee to submit the manufacturing process of their product. Hence, the assessee *vide* its communication dated 24.03.2015 informed that *'chewing tobacco'* and *'scented zarda/jarda tobacco'*, both contain the same ingredients.

75. A Notification No. 25/2015-CE dated 30.04.2015 was brought with effect from 01.05.2015 whereby the rate of Central Excise Duty of '*zarda/jarda scented tobacco*' came to be amended again but there was no change in the rate of duty on *'Chewing Tobacco'* as compared to *'zarda/jarda scented tobacco'*.

76**.** The assesee *vide* communication dated 28.05.2015 intimated to the department that with effect from 01.06.2015, they would be

manufacturing *'chewing tobacco'* falling under CET SH 2403 9910 instead of *'scented zarda/jarda tobacco'* falling under CET SH 2403 9930 and accordingly submitted a revised form to the competent officer. In the background of frequent changes made in the classification by the assessee and in order to ascertain the proper classification of goods, the officers of the department drew the samples of the products under panchnama dated 01.06.2015 and forwarded the same to the chemical examiner, CRCL, New Delhi and received the test report on 03.06.2015. It was found that the *'chewing tobacco'* contains identical ingredients that are contained in *'scented zarda/jarda tobacco.'* It was also noticed by the department that assessee through communication and declaration form filed prior to 28.05.2015 had mentioned their product as Pan masala and *"scented zarda/jarda tobacco".* Thus, having found that the product manufactured by the assessee namely, contains the same ingredients as '*chewing tobacco'* and 'scented zarda/jarda tobacco' and involves the same manufacturing process which was confirmed by the CRCL Report *vide* dated 03.06.2015 and the assessee had attempted to change their stand by filing convenient declarations, the claim of the assessee was not accepted. It appeared that

the assessee deliberately and intentionally mis-declared and misclassified their products with an intention to evade central excise duty. Hence an order dated 28.08.2015 came to be passed which covered the period of June 2015 to August 2015. In continuation of the same, four more orders for the period November 2015; December 2015; January 2016, and February 2016 came to be passed *vide* order dated 30.10.2015; 27.11.2015; 31.12.2015, and 29.01.2016 respectively demanding the amounts indicated therein. Being aggrieved by the said orders, the assessee preferred appeal Nos. 338 of 2015, 53 of 2016, 52 of 2016, 209 of 2016 and 210 of 2016 before the Commissioner (Appeals), which came to be disposed of by order dated 23.10.2017 on the ground that a notice under Section 11A of the CE Act, has already been issued for determination and confirmation of the duty payable, the assessee has liberty to raise all grounds before the authority adjudicating in the proceedings initiated vide the show cause notice issued on 02.02.2016 and accordingly, the appeals came to be disposed of vide order dated 23.10.2017.

77. The show cause notice dated 02.02.2016 came to be adjudicated vide order dated 16.07.2018 whereunder demand of duty amount of Rs.7,47,66,000/- along with interest and penalty came to be passed. Being aggrieved by the said order, the assessee has filed an Appeal No. E/53421/2018-EX(DB) before CESTAT, New Delhi which is pending; however, the assessee has simultaneously proceeded to challenge the order dated 23.10.2017 passed by the Commissioner (Appeals) before the tribunal in Appeal No. E/50468, 50469, 50470, 50471, and 50472 of 2018 which came to be allowed *vide* order 14.11.2018. Hence, the Revenue is in appeal in Civil Appeal Diary No. 6888 of 2020 against the said order the order dated 14.11.2018 passed by the CESTAT.

78. Similarly, the Revenue has also come in appeal in Civil Appeal Diary No. 44912 of 2019 against the order dated 14.11.2018 passed in Excise Appeal 51978 of 2018 and Excise Appeal No. 51319 of 2018 against the respondent-assessee wherein the Show Cause Notice dated 01.03.2017 was issued for the payment of differential duty of Rs. 16,95,33,000 by the Directorate General of Central Excise Intelligence Bhopal for the period of June 2015 to February 2016 which culminated

in order-in-original dated 20.12.2017. The said order held that the assessee has misclassified the product as '*chewing tobacco'* instead of '*zarda/jarda scented tobacco*' and the differential duty claimed in Show Cause Notice was affirmed. The said order became the subject of appeal No.51978 of 2018 and No.51319 of 2018 before the CESTAT which *vide* the common order dated 14.11.2018 set aside the OIO.

SUBMISSIONS OF PARTIES

79. Ms. Nisha Bagchi learned counsel appearing for Revenue, would contend, that tribunal committed a serious error in holding the product in question as 'chewing tobacco' though it was to be classified as 'zarda/jarda scented tobacco'. She would contend that tribunal failed to appreciate the test report dated 4.11.2015, suggested that the product did not contain added lime and yet on the ground test reports not having been drawn a finding has been recorded by the tribunal to the effect that adjudicating authority was not in a position to correlate the test report in the absence of test memo. She would also contend that tribunal failed to notice that assessee itself had requested for retest of the sample on

the ground that the test report is not very specific and the various parameters on which it was opined that the sample contained the characteristics of ZST have been clearly spelt out and that the retest has been allowed by the adjudicating authority is factually not correct.

The prayer for retest not being in consonance with CBEC's manual. Hence, she would contend that tribunal ought to have remanded the matter. She would further contend that the tribunal ignored the statement dated 27.10.2015 of Shri Ram Gopal Agnihotri, Director of assessee company whereunder the distinction between CT and ZST has been admitted as also the ingredients of the product manufactured by the assessee was set out. She would submit that the finding of CRCL on the test reports has been ignored by the tribunal, which clearly disclosed the final product manufactured by the assessee was ZST. Hence, she prays for the appeal to be allowed.

80. Whereas the learned Counsel appearing for the respondent would contend that the order passed by the Tribunal does not suffer from any infirmity and it is contended that assessee, admittedly, had followed the due procedure in law by following the statutory

declarations under the CTPM Rules, declaring that they intend to operate different number of machines in each of the months under dispute. It is contended that had there been any malafide intentions to wrongly claim the benefit reduced rate of duty on CT, the assess would have either increased its production by increasing the number of operating machines or at least would have maintained the very same number of operating machines. However, every month the assessee was consistently reducing the operating machines as per the demand of its product in the market. The decision to manufacture ZST prior to the period of dispute, and to manufacture CT during the period of dispute as well as using different number of packing machines every month was purely a commercial decision taken by the assessee based on several factors. By supporting the order of the tribunal, it is contended that CT and ZST are different product and known as such in the market and as such there cannot be a flip flop by selling same product in two different names. It is also canvassed that no enquiry was conducted by the department to ascertain the classification of the product namely no market enquiry was conducted to ascertain the common parlance understanding of the product. The product sold by the assessee had been

described on the package as 'chewing tobacco premium' and as per the Legal metrology (packaged commodities) rules 2011, the labelling/description contained on the packaging is determinative of the goods contained in the package, until proved to the contrary. Hence, the assessee has prayed for dismissal of the appeal.

DISCUSSION & FINDINGS

81. It is pertinent to note at the outset that show cause notice dated 02.02.2016 for the classification of the product is the subject matter of the appeal before the CESTAT in Appeal No. E/53421 of 2018 where under the order dated 16.07.2018 is impugned before it. The said order dated 16.07.2018 has been passed by the Commissioner pertains to the period of June 2015 to August 2015 where the Commissioner has adjudicated and passed an order regarding mis-classification.

82. The orders dated 30.10.2015, 27.11.2015, 31.12.2015 and 29.01.2016 which were impugned before the Commissioner (Appeals)

were disposed of on 23.10.2017 in the background of the show cause notice dated 02.02.2016.

83. The assessee who has two units namely, at Bhopal and Bilaspur by communication dated 18.03.2015 intimated the Jurisdictional Divisional officer that the product manufactured by them is '*zarda/jarda scented tobacco*' which is entirely different from '*chewing tobacco*'. It was also intimated that the nomenclature *'chewing tobacco'* is being used as there was no difference in capacity of production as well as rate of duty before budget 2015-16, since the government fixed different rates of duty for these products, they shall be discharging central excise duty as per the Notification No. 05/2015 dated 01.03.2015. However, the assessee *vide* its letter dated 08.06.2015 addressed to the jurisdictional Range officer informed that the manufacturing process of *'chewing tobacco'* and the ingredients used for manufacturing are same for both the products. It is also admitted by the assessee that '*zarda/jarda scented tobacco*' would contain additional ingredients of *gulab jal,* glycerine and perfume and as such panchnama dated 01.06.2015 was drawn. The report chemical examiner

disclosed that the samples obtained from the factory of the assessee where the assessee claimed to manufacture only *'chewing tobacco'* also contained the same ingredients that are used in the manufacturing of '*scented zarda/jarda tobacco*'. It is for this precise reason, the proceedings for misdeclaration and misclassification came to be initiated and OIO dated 28.08.2015 came to be passed which was affirmed in appeal on 23.10.2017. The adjudicating officer after having taken note of the chemical examiner's report dated 03.08.2015, whereunder it was found that the '*chewing tobacco'* manufactured by the assessee contains identical ingredients that are contained in *'zarda/jarda scented tobacco'* had arrived at a conclusion that the assessee has mis declared and misclassified its goods as *'chewing tobacco'* instead of '*scented zarda/jarda tobacco'*.

84. When the assessee itself *vide* a letter dated 18.03.2015 (refer to in para 6.4 at page 95 of order in original dated 16.07.2018) has intimated that the product manufactured by it was '*zarda/jarda scented tobacco'*. The stand or change of the nomenclature by the assessee contending that it is only *'chewing tobacco'* is completely misplaced for

three reasons namely: (1) there was no change in the manufacturing process of both the items and the product was claimed to be '*chewing tobacco'* containing the same ingredients as that of '*zarda/jarda scented tobacco';* (2) The declaration was filed by assessee as '*scented zarda/jarda tobacco'* up till 27.04.2015; (3) The duty payable had been determined on the basis of the deemed capacity of production under Rule 6(2) of the CTPM Rules.

85. On omission of Compounded Levy Scheme *vide* Act No. 14 of 2001 Section 3A of the CE Act, was again inserted by Act 18 of 2008, hence *'chewing tobacco'* was notified under Section 3A by Notification No. 10 of 2010 dated 27.02.2010. From time to time, several Notifications were issued increasing rate of duty for *'chewing tobacco'*, unmanufactured tobacco. Notification No. 4 of 2015 dated 01.03.2015 was issued notifying the deemed capacity of production per packing machine per month, on the same day on which Notification No. 5/2015 was issued. Subsequently, by Notification No. 25/2015 dated 30.04.2015 came to be issued under which the rate of duty per packing machine per month was notified which was based on packing speed. The differential

duty between *'chewing tobacco'* and *'zarda/jarda scented tobacco'* was not only vast but also huge. The following table is the mirror to this fact:

Period	**'Chewing Tobacco'**	**'Zarda/Jarda Scented Tobacco'**	**Relevant Notification**
Prior to 01.03.2015	Same	Same	
w.e.f. 01.03.2015	38.64 lakhs per packing machine per month	27.05 lakhs per packing machine per month	Notification No. 04/2015-CE (N.T.) dt. 01.03.2015
w.e.f. 30.04.2015	38.64 lakhs per packing machine per month	82.11 lakhs per packing machine per month	Notification No. 25/2015 CE dated 30.04.2015

86. Hence, the assessee who had taken a stand by its communication dated 18.03.2015 was manufacturing '*zarda/jarda scented tobacco*' changed its version and started contending the product manufactured by it is *'chewing tobacco'*. The assessee was changing the classification of its product, as the central excise duty on *'zarda/jarda scented tobacco'* and *'chewing tobacco'* was changing. The view taken by adjudicating authority is based on factual evaluation which derives its support from the CRCL Report which confirmed that the samples drawn

has the same ingredients as that of '*zarda/jarda scented tobacco*' and thereby rightly confirmed the duty demanded under the Show Cause Notice. The findings recorded by us in Group No. 1 in matter of *M/s Urmin Products* with regard to classification would squarely be applicable to the facts on hand and as such **both these appeals deserved to be allowed by setting aside the impugned order of the tribunal.**

IV. M/S DHARAMPAL PREMCHAND LTD. V. COMMISSIONER OF CENTRAL EXCISE - CA NO.2469 OF 2020, DIARY NO.3492, 3487, 2810, 3484, 3513, 3536, 3544, 3545 AND 3547 OF 2020

BRIEF FACTS

87. The assessee is in appeal before this Court assailing the common impugned Final Order dated 06.01.2019 passed by CESTAT, Allahabad. At the outset, we would like to state that the findings recorded and observations made under the present group of appeals are confined to this group only. The period of dispute involved in these appeals relates to May 2015 to January 2016.

88. The declarations filed by the assessee classifying their product as '*Chewing Tobacco'* were approved by orders passed by the Deputy Commissioner upto 23.09.2015 though a higher rate had been prescribed for 'zarda/jarda *scented tobacco*' *vide* Notification No.25/2015 dated 30.04.2015. The Deputy Commissioner thereafter *vide* Order dated 13.01.2016 amended assessee's declaration dated 08.01.2016, wherein assessee classified the product as CET SH 24039910 *i.e., 'chewing tobacco'*, and Deputy Commissioner reclassified it to CET SH 2403 9930 *i.e., 'zarda/jarda scented tobacco'*, w.e.f. 16.01.2016. The Deputy Commissioner in his Order dated 13.01.2016 justified the reclassification on account of discovery of the fact that similar manufacturer i.e, M/s Dharampal Satyapal was manufacturing the same product with identical manufacturing process and classifying the product as *'zarda/jarda scented tobacco'*. Subsequent order came to be passed on 17.02.2016 correcting the next declaration dated 11.02.2016 w.e.f. 18.02.2016, after affording a personal hearing.

89. The Revenue had also issued two show cause notices pertaining to the goods manufactured at two different factories of the assessee. Show cause dated 04.05.2016 was issued for the factory located at 1D, A-34/35, Sector 60, NOIDA (hereinafter referred to as **"1D factory"**) and show cause notice of same date was also issued for the factory located at 6A, A-34/35, Sector 60, NOIDA (hereinafter referred to as **"6A factory"**). An Addendum dated 09.02.2016 was made to the show cause notices wherein reliance on CRCL reports were placed regarding the characteristics of the product. Under both the show cause notices, differential duty for the period May 2015 to January 2016 which was short paid on the ground of misdeclaration was demanded along with interest, and penalty. The reclassification and the demand proposed in the Notices were confirmed by the Commissioner by OIO on 28.11.2017 and 29.11.2017 respectively. These orders were challenged before the High Court of Allahabad in Writ Tax No. 232/2018 and Writ Tax No. 234/2018, which came to be dismissed on the ground that the petitioner has alternate remedy. The SLP No. 7369/2018 challenging the order dated 26.02.2018 passed in Writ Tax No. 232/2018 also came to be dismissed. Hence the assessee preferred Appeal No. 70437/2018

and 70438/2018 before CESTAT, which came to be rejected by Final Order No. A/71893-94/2019-EX (DB) dated 06.11.2019.

90. Hence, the present appeals came to be filed by assessee before the Tribunal in respect of:

a. The adjudication orders in the show cause notices dated 04.05.2016.

b. The appellate orders confirming the amendments made to the declarations on and after 08.01.2016 from ‘chewing tobacco’ to ‘zarda/jarda scented tobacco’.

c. A refund claim made in respect of duty paid in February 2016 under protest after the declaration was modified.

d. Abatement/ refund granted but appropriated towards payment of duty.

91. The dispute in all these appeals revolved around the classification of the impugned product. The tribunal by common order dated 06.11.2019 dismissed the appeals and upheld the orders impugned before it.

92. Being aggrieved by the order of the tribunal dated 06.11.2019 these appeals have been filed.

SUBMISSIONS OF THE PARTIES

93. The thrust of the arguments canvassed by Mr. S.K Bagaria, learned Senior Counsel appearing for the appellant/assessee is: the original authority had acted beyond the jurisdiction and travelled beyond the powers vested under Rule 6 of the CTPM Rules, 2010. He would also contend that the issue of classification of a product cannot be the subject matter of adjudication in an order passed under Rule 6(2) of CTPM Rules. He would contend that when the issue of classification of a product arises, the initial burden is on the Department/Revenue, and it can be contested by the assessee and thereafter the dispute is to be adjudicated by following the principles of natural justice. He has submitted that these aspects though urged before the tribunal, had been completely ignored and as such impugned orders are required to be set aside by this Court.

94. He would elaborate his submissions by contending that the issue of classification is an independent issue in itself and no decision on the classification can be taken in a matter concerning the approval of declaration under Rule 6 of the CTPM Rules. He would also contend that the description of a product as declared under the declaration filed under Rule 6 cannot be changed by the Revenue when the product has been sold and marketed under a particular heading. He would contend that under the CETA, there is no definition of *'chewing tobacco'* and '*zarda/jarda scented tobacco'* and therefore the test lies in the market understanding of the product and the same would prevail. He would further contend that under Rule 6 of CTPM Rules, the authority would only consider the number of machines installed in the factory and production capacity of the same and it was not open to him to examine the correct classification of the product. In support of his submissions, he has relied upon the following judgments:

(i) ITC Ltd. v. Commissioner (2019) 17 SCC 46.

(ii) HPL Chemicals Ltd. v. CCE, Chandigarh 2006 (197) ELT 324 [SC]

(iii) Mauri Yeast India Pvt. Ltd. v. State of U.P. 2008 (225) ELT 321 [SC]

(iv) CCE Nagpur v. Shree Baidyanath Ayurved Bhawan 2009 (237) ELT 225 [SC]

(v) W.P.I.L. Ltd. v. CCE 2005 (181) ELT 359 [SC]

(vi) Mathuram v. State of M.P. (1999) 8 SCC 667

(vii) CC v. Dilip Kumar and Company (2018) 9 SCC 1

(viii) Indo International Industries v. CGST (1981) 2 SCC

(ix) UOI v. Delhi Cloth and General Mills Co. Ltd. 1963 Supply (1) SCR 586

95. M/s. Nisha Bagchi, learned counsel for the Revenue would contend that the declaration filed by the assessee classifying their product as 2403 9910 was approved and orders were passed by the Deputy Commissioner upto 23.09.2015 though a higher rate had been prescribed for '*zarda/jarda scented tobacco*' by Notification No.25 of 2015 dated 30.04.2015 which product was manufactured by the assessee. She would contend that '*zarda/jarda scented tobacco*' was notified under Section 3A of CE Act, *vide* Notification No.17 of 2010 dated 13.04.2010 and by Notification No.18 of 2010 dated 13.04.2010, the CTPM Rules were amended to cover '*zarda/jarda scented tobacco'*. She would contend that the declarations filed by the assessee were determined and/ or adjudicated after affording a personal hearing and by relying upon the admission/statement made by the General Manager

of the assessee during the personal hearing, the Deputy Commissioner has modified all subsequent declarations which came to be confirmed by the appellate authority. She would also place reliance upon the CRCL report to contend that the samples drawn from one of the units had a pleasant odour/fragrance. She would draw the attention of the Court to the findings recorded by the tribunal which is to the effect that the use of saffron and scented flavour in the manufacture of the product had been admitted by the General Manager; and, one unit of the same group was manufacturing an identical product which was being classified as '*zarda/jarda scented tobacco*' and both these products had the same brand name and was entering the market as the same product. She would also contend that the appellant had not contested that manufacturing process which was identical and both products were marketed under the same brand name. She would also submit that the classification of the product ought to have been under CET SH 2403 9930 and there cannot be estoppel in taxation matters for rectifying the past erroneous classification/ declaration which was approved pursuant to intentional misdeclaration and wilful suppression. To conclude her arguments, she would submit that the adjudicating authority and the

tribunal have considered the factual matrix and arrived at a well-reasoned conclusion based on the characteristics of the product, the test reports applying the commercial parlance, admission of the assessee, and the definitions found in IS glossary and existing precedents. Hence, by relying upon the following Judgments she has sought for dismissal of the appeals:

(i) CCE v. Cotspun (1999) 7 SCC 633 (Para 14, 15)
(ii) Vivek Narayan Sharma v. Union of India 2023 (3) SCC1
(iii) Hindustan Poles Corpn. v. CCE (2006) 4 SCC 85
(iv) Mishra Zarda Traders v. State of Orissa 1987 SCC Online 363
(v) Swiss Ribbons Pvt. Ltd. v. Union of India (2019) 4 SCC17

ISSUES FOR CONSIDERATION

96. Having heard the learned advocates appearing for the parties and after bestowing our anxious consideration to the rival contentions raised at the bar the following points/questions would arise for our consideration:

(1) What is the purpose of the declaration filed under Rule 6 of CTPM Rules?

(2) What are the parameters which are required to be examined, determined, and adjudicated under Rule 6 by the Prescribed Authority?

(3) Whether the Prescribed Authority have the power and jurisdiction to determine the classification or specific entry within which the declared product is to be classified?

OR

Whether the issue of classification of a product can be the subject matter of adjudication/decision under Rule 6(2) of CTPM Rules?

(4) Whether a declaration made under Rule 6 has any nexus to the classification of the product and on account of the classification of such declaration, would preclude the Department from issuing a Notice under Section 11A or 11AC of CE Act, 1944?

DISCUSSION AND FINDINGS

97. While adjudicating the above questions/points, the answer to one is likely to overlap with the other and as such we propose to adjudicate these questions together and we propose to answer them accordingly and record conclusion question or point-wise.

98. For undertaking the aforesaid exercise, it would be necessary to examine the applicable rules in question *i.e.,* '*Chewing Tobacco'* and Unmanufactured Tobacco Packing Machines (Capacity Determination

and Collection of Duty) Rules, 2010. The aforesaid rules came to be notified by Notification No.11 of 2010 dated 27.02.2010 which came into force from 08.03.2010. The aforesaid rules were made applicable to the goods specified and notified as per Section 3A. '*Chewing tobacco'* was notified under Section 3A by Notification No.10 of 2010 dated 27.02.2010 and '*zarda/jarda scented tobacco'* was specified as notified goods under Section 3A of CE Act, 1944 by Notification No.17 of 2010 dated 13.04.2010 on the same day i.e. 13.04.2010 Notification No.18 of 2010 came to be issued amending the CTPM Rules, 2010 to cover *zarda/jarda scented tobacco*.

99. The aforesaid rules to the extent it require adjudication of the points/questions formulated hereinabove would necessarily be required to be extracted and Rule 6 which would have direct bearing on the points formulated hereinabove is extracted herein below for immediate reference and it reads:

> "**Rule 6. Declaration to be filed by the manufacturer.** - (1) A manufacturer of notified goods shall, immediately on coming into force of these rules, and not later than 8th March, 2010, declare in Form 1 annexed to these rules,
>
> (i) the number of single-track packing machines available in his factory;

(ii) the number of packing machines out of (i), which are installed in his factory;

(iii) the number of packing machines out of (i), which he intends to operate in his factory for production of pouches of notified goods with lime tube and without lime tube, respectively, with effect from the 8th day of March, 2010;

(iv) the number of multiple track or multiple line packing machine available in his factory;

(v) the number of multiple track or multiple line packing machines out of (iv), which are installed in his factory;

(vi) the number of multiple track or multiple line packing machines out of (iv), which he intends to operate in his factory for production of pouches of notified goods without lime tube and with lime tube, respectively, with effect from the 8th day of March, 2010;

(vii) the name of the manufacturer of each of the packing machine, its identification number, date of its purchase and the maximum packing speed at which they can be operated for packing of pouches of notified goods, with lime tube and without lime tube, of various retail sale prices;

(viii) description of goods to be manufactured including whether unmanufactured tobacco or chewing tobacco or both, their brand names, whether pouches shall contain lime tube or not;

(ix) denomination of retail sale prices of the pouches to be manufactured during the financial year;

(x) the plan and details of the part or section of the factory premises intended to be used by him for the manufacture of notified goods of different denomination of retail sale prices and the number of machines intended to be used by him in each such part or section, to the jurisdictional Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the jurisdictional Superintendent of Central Excise :

Provided that a new manufacturer shall file such declaration at least seven days prior to the commencement of commercial production of notified goods in his factory.

> (2) On receipt of the declaration referred to in sub-rule (1), the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, shall, after making such inquiry as may be necessary including physical verification, approve the declaration and determine and pass order concerning the annual capacity of production of the factory within three working days in accordance with the provisions of these rules.
>
> **Provided** that the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, may direct for modifications in the plan or details of the part or section of the factory premises intended to be used by the manufacturer for manufacture of notified goods of different retail sale prices, as he thinks proper, for effective segregation of the parts or sections of the premises and the machines to be used in such parts or sections before granting the approval :
>
> **Provided** further that if the manufacturer does not receive the approval in respect of his declaration within the said period of three working days, the approval shall be deemed to have been granted subject to the modifications, if any, which the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, may communicate later on but not later than thirty days of filing of the declaration."

100. A perusal of the above rule would indicate that the manufacturer of notified goods should immediately on coming into force of the Rules (08.03.2010) file a declaration in Form No.1 declaring the details of notified goods as prescribed or specified under sub-rule (i) to (x) and on receipt of such declaration the jurisdictional Deputy Commissioner or the Assistant Commissioner of Central Excise, namely, the Competent Authority, would approve the declaration and determine and

pass orders concerning the annual capacity within three working days after making such inquiry as may be necessary including physical verification. The first proviso to Rule 6 of CTPM mandates that the authorised officer may direct modifications of the details as prescribed thereunder. The perusal of the second proviso would indicate that if the manufacturer does not receive the approval in respect of his declaration within the said period of 3 working days, the approval shall be deemed to have been granted subject to the modifications, if any, which the authorised officer as the case may communicate not later than 30 days of the filing of such declaration.

101. Learned counsel appearing for the assessee has raised a contention that since the classification of the product being disputed by the Revenue, the burden lies upon the Department and it is beyond the scope of Rule 6(2) and suggested change of classification whilst adjudicating a declaration made under Rule 6 can only be by the issuance of a Notice or otherwise, it would be foul of natural justice. The said argument howsoever attractive cannot be accepted for the simple reason that sub-rule (2) of Rule 6 would clearly indicate that on

receipt of a declaration referred to in sub-rule (1), the Competent Authority would be required to make such inquiry as may be necessary including physical verification by determining the correctness or otherwise of such declaration concerning the annual capacity of production of the factory. The nomenclature of the Rule would itself indicate that the said Rule is called as *"Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity, determination and collection of duty) Rules, 2010".* A combined reading of clause (i) to (x) of sub-rule (1) of Rule 6 would indicate during the inquiry contemplated under sub-rule (2), the adjudicating authority would be determining the annual capacity production of the factory and the Competent Authority would be required to take into consideration the details of the track packing machines installed in the factory, the number of packing machines which are available and the assessee intending to operate in his factory, number of multiple tracks or multiple line packing machines available and to be used or operated with and without lime tube. The maximum packing speed of such machines, various retail sale prices, description of goods to be manufactured including whether 'unmanufactured tobacco' or '*chewing tobacco*' or both, and

whether pouches contain lime tube or not, details of said products, are to be determined. In the process of undertaking such an exercise, the Competent Authority would be required to necessarily examine as to whether the product in question would fall within the classification of notified goods, inasmuch as the product has to necessarily fall within the notified goods as notified under sub-section (1) of Section 3A and for the relevant period.

102. The Form of declaration that has been prescribed under Rule 6 is Form No. 1 and such declaration ought to contain the details specified thereunder. For the purposes of clarity and brevity we deem it appropriate to extract the Form No.1 as prescribed under Rule 6 herein below:

"**FORM - 1**

[See rule 6]

(1) Name of the manufacturer :

(2) Address of the manufacturing premise :

(3) ECC No:

(4) Address of other premises manufacturing the same products :

(5) Number of single track packing machines available in the factory :

(6) Number of packing machines out of (5), which are installed in the factory :

(7) Number of packing machines out of (5), which the manufacturer intends to operate in his factory for production of pouches of notified goods with lime tube and without lime tube, respectively :

(8) Number of multiple track or multiple line packing machine available in the factory :

(9) Number of multiple track or multiple line packing machines out of (8), which are installed in the factory :

(10) Number of multiple track or multiple line packing machines out of (8), which the manufacturer intends to operate in his factory for production of pouches of notified goods with lime tube and without lime tube, respectively :

(11) Name of the manufacturer of each of the packing machine, its identification number, date of its purchase and the maximum packing speed at which the machines can be operated for packing of notified goods, with lime tube and without lime tube, of various retail sale prices :

(12) Description of goods to be manufactured including whether unmanufactured tobacco or chewing tobacco or both, their brand names, whether pouches shall contain lime tube or not, and other concerned details :

(13) Denomination of retail sale prices of the pouches to be manufactured during the financial year :

(14) The ground plan and details of the part or section of the factory premises intended to be used by him for manufacture of notified goods of different denomination of retail sale prices and the number of machines intended to be used by him in each of such part or section :

(15) Declaration

(a) I/We further declare that the particulars furnished above are true and correct in all respects. In case any particulars are found to be untrue/incorrect, I/We undertake to pay any additional amount of excise duty on notified goods manufactured by me/us as per provisions of the Central Excise Act, 1944 (1 of 1944) or the rules made or notifications issued thereunder.

> (b) I/We further undertake that any addition or removal of the packing machine would be done under the physical supervision of the Central Excise Officer as per the procedure provided in the Chewing Tobacco and unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010.
>
> (c) I/We hereby agree to abide by the provisions and conditions of the Chewing Tobacco and unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010.
>
> Place:
>
> Date: Name, residential address and signature of
>
> manufacturer/authorised agent"

103. *'Chewing tobacco'* and preparations containing *'chewing tobacco'* was found in Entry CETH 2404.41 by virtue of Notification No.13 of 2006 dated 01.03.2002 and it was covered under MRP-based assessment under Section 4A of CE Act. On the advent of 8 (eight) digit tariff regime '*zarda/jarda scented tobacco'* was introduced under a separate head under 'CET SH 2403 9930' and *'chewing tobacco'* under the head 'CET SH 2403 9910' with effect from 28.02.2005. However, Notification No.2 of 2006 which was issued in supersession of Notification No.13 of 2002 '*zarda/jarda scented tobacco*' was deleted or, in other words, such Entry was omitted.

104. In the light of the two products having been notified under Section 3A as 'notified goods' which is contemplated under Rule 2(c), it cannot be gainsaid by the assessee that while adjudicating the declaration filed, the issue of classification would not fall within the domain of the adjudicating authority under Rule 6(2). In the event, that there has been improper classification of the notified goods the adjudicating authority would be empowered to rectify the misclassification, all the more, in a situation where it has been misclassified with an intention to evade a higher rate of duty. It is in the teeth of the same, that the expression *"inquire, determine and pass order"* will acquire great significance under Rule 2(c). The declaration which is required to be filed under Rule 6(1) by a manufacturer is of *"notified goods"*. The said notified goods means as defined under Rule 2(c) which reads as under:

> "**(c) "notified goods"** means unmanufactured tobacco, bearing a brand name, and chewing tobacco notified under sub-section (1) of section 3A of the Act by the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 10/2010-Central Excise (N.T.), dated the 27th February, 2010;"

105. From time to time, the notified goods came to be included or excluded, which power vested with the rule-making authority and there cannot be any quarrel on this proposition. The product *zarda/jarda scented tobacco*, as noticed herein (supra) came to be notified under Section 3A (1) of CE Act, 1994, with effect from 13.04.2010 and correspondingly the CTPM Rules also came to be amended to cover *zarda/jarda scented tobacco*. As such the assessee contended that the adjudicating authority would not be within his powers to determine the classification.

106. A holistic reading of Rule 6 would indicate that the details prescribed thereunder alone would be the subject matter of determination concerning the annual capacity of production of the factory. The second proviso to Rule 6 would clearly indicate that the Prescribed Authority is empowered to modify the declaration on the facts obtained from such declaration. While undertaking such exercise of determination and passing orders concerning the annual capacity of production of the factory as contemplated under sub-rule (2) of Rule 6, the Prescribed Authority would have to take into consideration the issue

relating to the classification of the product. We say so for reasons more than one, **firstly**, the details required to be furnished as prescribed under clause (i) to (x) of sub-rule (1) of Rule 6 would indicate that apart from details mentioned therein, the declarant will have to specify the **description of goods** to be manufactured without specifying the classification entry to the Central Excise Tarif Act. On the basis of such declaration filed by the assessee, the duty for a particular month has to be calculated by application of the appropriate rate of duty specified in the notification as indicated under Rule 7. Necessarily to ascertain the duty payable, the issue of classification will have to be gone into in an inquiry held under sub-rule (2) of Rule 6, as otherwise the inquiry contemplated would become redundant or meaningless. **Secondly,** to calculate the duty of the product, the condition precedent is the capacity of the production. Thus, it becomes important to ascertain the capacity of production first, which can only be done when the concerned authority is acquainted with the product as described which would ultimately assist the Competent Authority to classify the product under the appropriate tariff head as provided under CETA. **Thirdly,** the rationale behind Rule 6(2) is that, unless there is proper classification

of the product, the Competent Authority would not be in a position to ascertain the correct classification under the tariff head and consequently would not be able to determine the annual capacity of the production of the notified goods, which may lead to improper calculation. This is more so, for every notified product may not possess similar ingredients as that of the other product. It is trite law that changes in the ingredient of a product can bring about change in the production capacity, namely, affect the manufacturing process. Thus, in the event of mis-description, wrong description or erroneous description or intentional improper classification of the product manufactured would not tie the hands of the Competent Authority from piercing the corporate veil to ascertain the true nature of the product and reclassify the same, necessarily after affording an opportunity of hearing which would be in compliance of the doctrine of natural justice. The object sought to be achieved by this Rule is to empower the Department to determine the annual capacity based on the declaration of the assessee and such declaration would not be required to be accepted in the event of there being an improper description of the goods or product in the declaration so filed. In fact, declaration Form

No.1 itself would indicate that in column No.15A, the declarant has agreed to bind itself to pay any additional amount of excise duty on notified goods manufactured by it by such declaration, if found to be untrue or incorrect. This undertaking would reinforce the fact that even in case of acceptance of such declaration by the Competent Authority, it does not preclude them thereafter to demand the differential duty on account of short demand to recover such duty, and necessarily complying with the principles of natural justice.

107. As noticed hereinabove both the parties have relied upon the judgment of this Court in ***CCE V. Cotspun*** (supra) whereunder this Court has held that once there is the levy of excise duty on the basis of an approved classification list, until the correctness of the approval of the question by issuance of a show cause notice to the assessee, same cannot be disturbed. It has been further held that levy of excise duty on the basis of an approved notification is not a short levy. It was also held that differential duty cannot be recovered on the basis that it is a short levy and revised assessment could be made effective prospectively from the date of the show cause notice and not with

reference to earlier removals made under an approved classification list. In this background, it came to be held that as long as classification list subsists, the differential duty cannot be claimed on the same product.

108. It has to be noticed that in ***Cotspun*** (supra) the assessee was manufacturing NES Yarn and the classification list was filed by the manufacturer as required under Rule 173-B of the Central Excise Rules, 1944 and same had been approved by the Competent Authority and it was accordingly classified under old Tariff Item No.19-I(2)(a) and (2)(e). Notice to reopen the assessment for the period February 1977 to May 1977 was issued on the ground that the NES Yarn ought to have been classified under old Tariff Item No.19-I(2)(f) and the differential duty was demanded. This was followed by a second show cause notice and subsequently amended by corrigendum. The adjudicating authority upheld the contention of the assessee by arriving at a conclusion that duty liability had been ascertained based on an approved classification list, and the question of short levy did not arise. However, the appellate authority allowed the appeal and confirmed the demand. On appeal, the tribunal held the revised assessment could be made effective only

prospectively, namely, from the date of show cause notice, not earlier. This Court took note of the fact that the assessee was required to file before the appropriate Excise Officer, for approval, a list of the goods that he proposes to clear and the said list indicated that details to be found in such approval list filed before the Appropriate Authority which not only include the description of the goods produced or manufactured by the declarant but also provided the tariff entry under which the goods that the declarant intends to remove would fall and the rate of duty leviable thereon, apart from other particulars, as prescribed under sub-rule (2) of Rule 173-B. It is these details which had been furnished by the assessee in ***Cotspun's*** **case** (supra) which had been accepted and while justifying its demand of reclassification, would operate retrospectively by relying upon Rule 10 of the Central Excise Rule, 1944, which is similar to the contention raised in the present case. However, this contention did not find favour by this Court on the ground that Rule 173-B dealt with the classification list and Proper Officer ought to have made inquiry and approve the list with such modifications as was considered necessary, after such inquiry, as he deems fit, unless otherwise directed by the Proper Officer, determine the duty payable on

the goods intended to be removed in accordance with such list *vide* sub-rule (2) of Rule 173-B. Whereas the corresponding Rule 6 in the instant case does not indicate or remotely suggest declaration of such classification is required to be made. However, Rule 6(2) only prescribes the description of the goods to be specified by the declarant in his declaration. Hence, this would result in casting additional onerous responsibility on the Competent Authority to undertake the exercise of ascertaining as to the nature of the goods and its classification under CETA for proper determination of production capacity of the machine. It would also be apposite to note the judgment of this Court in ***CCE** v. **Srivallabh Glass Works Ltd.** (2003) 11 SCC 341* whereunder the ***Cotspun's* case** (supra) was distinguished on facts and held that ***Cotspun's* case** *(supra)* only lays down that so far as classification list subsists, the differential duty cannot be claimed on the same product mentioned in the classification list, however, if the product being cleared is different from the one mentioned in the classification list, the principles enunciated in ***Cotspun's* case** (supra) would not be applicable. In that view of the matter, we are of the considered view that the Revenue has the power and jurisdiction to determine the

classification for specific Entry within which the product is to be declared or classified and the issue of classification can be the subject matter of adjudication/ decision under sub-rule (2). A declaration made under Rule 6 resulting in the determination and passing of the order under sub-rule (2) of Rule 6 would not preclude the Department or Revenue from issuing notice under Section 11A or Section 11AC of CE Act where there is wilful misstatement or suppression of fact leading to what levy or non-levy of the duty.

109. In the instant case, the declaration confined to '*chewing tobacco'* falling under CET SH 2403 9910. However, during the course of such inquiry, the Competent Authority would be competent to examine as to whether the product would fall within the notified goods. In the instant case, '*zarda/jarda scented tobacco*' was specified as notified goods under Section 3A by Notification No.17 of 2010 dated 13.04.2010 and the CTPM Rules also correspondingly had been amended on the same day *i.e.,* 13.04.2010 by Notification No.18 of 2010. Thus, taking into within its sweep the said 'notified goods' as defined under Rule 2(c) of CTPM Rules for the purposes of

classification and this exercise undertaken by the Competent Authority cannot be found fault with. Hence, we record our finding on the questions formulated hereinabove as under:

> (1) What is the purpose of the declaration filed under Rule 6 of CTPM Rules?
>
> **ANSWER:** To ascertain the details of the product to be manufactured and the nature of the product for purposes of fixing the packing capacity of the machine and determine the duty.
>
> (2) What are the parameters which are required to be examined, determined, and adjudicated under Rule 6 by the Prescribed Authority?
>
> **ANSWER:** To inquire and determine the correctness of the details furnished under the declaration, namely, Form No.1.
>
> (3) Whether the Competent Authority have the power and jurisdiction to determine the classification or specific entry within which the declared product is to be classified?
>
> **OR**
>
> Whether the issue of classification of a product can be the subject matter of adjudication/decision under Rule 6(2) of CTPM Rules?
>
> **ANSWER:** Yes.
>
> (4) Whether a declaration made under Rule 6 has any nexus to the classification of the product?
>
> **ANSWER:** Yes, for the purpose of determining the packing capacity and corresponding duty.
>
> (5) Whether on account of classification by such declaration, would preclude the Department from issuing a Notice under Section 11A or 11AC of CE Act, 1944?

ANSWER: No, if there is improper or misdeclaration or improper declaration.

110. **In the light of the findings recorded herein above, we are of the considered view that the impugned orders of the tribunal would not be sustainable and the order of the adjudicating authority deserves to be upheld, consequently these appeals deserves to be allowed,** except Civil Appeal arising out of Diary No. 3487 of 2020 which is directed against the order dated 06.11.2019 passed by the CESTAT in Excise Appeal No. 70242 of 2018., which stand on a different footing and hence the said appeal is taken up for consideration and disposed of by the following order.

111. The appellant-assessee filed an abatement claim amounting to Rs. 1,99,41,935/- before the Deputy/Assistant Commissioner, Central Excise, Division-II, Noida under Rule 10 of CTPM Rules. The said claim was adjudicated and by order dated 30.3.2016 was allowed. However, under the very same order the said amount which was allowed to be distributed to the assessee by cash was ordered to be

appropriated under Rule 9 of CTPM Rules read with Section 11 of CE Act.

112. Being aggrieved by the aforesaid order, an appeal came to be filed before the Commissioner who by order dated 31.08.2017 upheld the order-in-original dated 30.03.2016 to the extent of appropriation of central excise duty of Rs.1,82,56,000/- and set aside to the extent of interest of Rs.18,59,042/ levied.

113. Being aggrieved by the same, appeal was filed before the CESTAT in Excise Appeal No.70242 of 2018 contending before the tribunal that the order of the Deputy Commissioner dated 30.03.2016 is in violation of natural justice, namely, in the grounds of appeal before this Court it has been urged the impugned order passed by the tribunal it had failed to address the issue of abatement of Rs. 1,96,67,556/-. On perusal of the case papers and after hearing the learned advocates appearing for the parties, we notice that the tribunal has failed to examine this issue. **Hence, on the short ground of tribunal having not examined this issue, the appeal deserves to be allowed**. **Accordingly, Civil Appeal arising out of Diary No. 3487 of 2020 is**

allowed and the matter is remitted to the tribunal for adjudication *de novo* on merits. We have not expressed any opinion on merits, and contentions of both the parties on the issue of abatement is kept open.

V. COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX V. M/S TEJ RAM DHARAM PAUL - CIVIL APPEAL NO. 3596 OF 2023

BRIEF FACTS

114. The period of dispute in this group is May 2015 to December 2015. The assessee claims the product to be classified under CET SH 2403 9910 *i.e.,* '*chewing tobacco',* whereas the Revenue contends that the product ought to have been classified under CET SH 2403 9930 *i.e., 'zarda/jarda scented tobacco'*. Coming to the facts of this appeal, the assessee submitted Form No.1 before the jurisdictional Central Excise Division declaring that they would manufacture '*Mahapasand Zarda/Jarda Scented Tobacco'* and paid duty accordingly for the period from 10.03.2015 to 31.03.2015. Thereafter, Form No.2 was submitted by the assessee, and duty was paid on '*Zarda/Jarda Scented Tobacco'*.

The Revenue drew samples of the product on 13.03.2015 and forwarded the same to the CRCL who by its report dated 23.03.2015 classified the product as *'chewing tobacco'*. Accordingly, the assessee was informed on 27.04.2015 that the product is to be classified as *'chewing tobacco'*.

115. Accordingly, the appellant-assessee submitted revised Form No.1 on 23.05.2015 and informed that they would manufacture '*chewing tobacco'*. Notification No.25 of 2015 which came into effect from 30.04.2015 under which the rate of duty for packing machine per month was notified on 1.03.2015. Hence, the Department drew fresh samples under Panchnama dated 29.05.2015 and forwarded the same to CRCL for obtaining the report. The CRCL forwarded the report on 20.07.2015 without classifying the product. On being asked to classify the tariff entry by the Revenue, the Chemical Examiner *vide* communication dated 27.07.2015 refused to do so stating "assessing officers at various levels should not ask the Deputy Chief Chemist/Chemical Examiner to give the tariff classification", citing para 70 (B) and (C) of manual of the Revenue Laboratories. Thereafter, on 04.12.2015 Revenue visited the premises of the assessee again and

took samples which came to be recorded in Panchnama and forwarded the same to CRCL for fresh reports. In the meanwhile, the Competent Authority passed the capacity determination order on 18.12.2015 under Rule 6(2) of CTPM Rules holding that the product manufactured by the appellant-assessee for the period from May 2015 to December 2015 is '*zarda/jarda scented tobacco'*. On 21.12.2015 assessee was called upon to deposit differential duty along with interest and same was deposited under protest.

116. On 01.07.2016 a show cause notice was issued demanding duty, interest, and penalty under Section 11A, 11AA, and 11AC read with relevant Rules which came to be adjudicated by OIO dated 18.03.2021 whereunder the demand made under the show cause notice was affirmed. In the interregnum, the assessee challenged the capacity determination order No.24 of 2015 dated 18.12.2015 before the Commissioner (Appeal-I) who dismissed the appeal on the ground that it was premature as the issue relating to the classification was pending since the show cause notice dated 01.07.2016 had already been issued and it was yet to be decided *vide* order dated 06.12.2016. Aggrieved by

the same an appeal was filed before the tribunal and tribunal held that issue of classification was open and it was to be decided by the adjudicating authority. Subsequently, OIO came to be passed on 18.03.2021, confirming the duty demand and further ordered for appropriation of the amount specified thereunder, apart from imposing of penalty. Being aggrieved by the same, appeal was filed before the tribunal which came to be allowed and the order dated 18.03.2021 was set aside. Hence, this appeal by the Revenue.

SUBMISSIONS OF THE PARTIES

117. Ms. Nisha Bagchi, the learned counsel for the Revenue, criticized the tribunal's decision, arguing that it did not examine the definitions in the IS glossary and ignored the CRCL report dated 14.12.2015. She argued that adding scent to Zarda would change the product's character to *'zarda/jarda scented tobacco*'. Ms. Bagchi also cited the assessee's representative's statements and the fact that the product was previously classified as 'Mahapasand zarda/jarda *scented tobaccot*' for March and April 2015 but was later changed to *'Mahapasand chewing tobacco* (without lime tube)' for May 2015 to

December 2015. Ms. Bagchi argued that the assessee's dual stand at different times depending on the rate of duty the product attracted was evident in Notification No.25 of 2015, which fixed the duty per packing machine/per month. In reply, Mr. S.K. Bagaria, learned Senior Counsel appearing for the appellant-assessee has not only relied upon the communication dated 27.04.2015 (Annexure A-7) but also the CRCL Report dated 23.03.2015 which would indicate that the consistent stand of the Department itself was that the product manufactured by the assessee is '*chewing tobacco'* and as such the impugned order of the tribunal would not warrant interference.

118. The assessee argued that the Revenue's assumption that adding certain flavours to *'zarda scented tobacco*' is incorrect, as these additives only enhance the taste and assessment of the product as a *'chewing tobacco*', and do not change the basic characteristics. It was also contended that '*chewing tobacco'* and '*zarda/jarda scented tobacco'* having not been defined under the statute, the principles of trade parlance must be resorted to, which is its popular meaning and understanding by those people using the product and not scientific and

technical. The assessee also harped upon the contention that the last report dated 14.12.2015 of the CRCL is an 'induced opinion'. It was further contended that the Revenue had failed to establish or demonstrate that the product is not *'chewing tobacco'* and the cross-examination of the Chemical Examiner reflected that she had failed to substantiate her report as to the basis on which she opined that the product is '*zarda/jarda scented tobacco'*. Hence, relying upon the following judgments the assessee has sought for the appeal to be dismissed:

'1. Prabhat Zarda Factory v. Commr. Of Central Excise [2004 (163) ELT 485 (Tri-Delhi)
2. Suresh Enterprises v. Commr. Of Central Excise, decided on 06.07.2006.
3. Yogesh Associates v. CCE, Surat-II (2005(188) ELT 251 (SC).
4. Gopal Zarda Udyog v. CCE, New Delhi 2005 (188) ELT 251
5. Dharam Pal Satyapal v. CCE New Delhi [2005 (183) ELT 241 (SC).'

DISCUSSION AND FINDINGS

119. Heard the learned counsel appearing for the parties and on perusal of the record it would emerge therefrom that the Form No.1 dated 05.03.2015 submitted by the assessee before the jurisdictional

Central Excises Division, Kundli, it had declared that they were manufacturing '*Mahapasand zarda/jarda scented tobacco'*. On 17.03.2015, Form No.2 was submitted by the assessee for the period 10.03.2015 to 31.03.2015, and duty was paid for the said period as per declaration in Form No.1. On 13.05.2015 the Department by Panchnama on the same date, drew samples of the product of the assessee's product *i.e.,* '*Mahapasand zarda/jarda scented'* manufactured and forwarded the same to CRCL who by the opinion dated 23.05.2015 opined as under:

"**TEST REPORT:**

> "The sample is in form of brown coloured dried pieces of vegetable matter. It is a preparation containing tobacco, lime and flavouring agents. It is other than Jarda Scented Tobacco. It has the characteristic of Khaini".

120. Based on the said report the Department by communication dated 27.04.2015 informed the assessee, the product being manufactured by the assessee is classifiable under Chapter sub-heading 2403 9910 as *'chewing tobacco (other than filter Khaini)'* and as such called upon the assessee-respondent to show cause as to why the Form No.1 dated 05.03.2015 should not be rejected as the product

manufactured by the respondent-assessee fell in the category of '*chewing tobacco (other than filter Khaini)'* and not under sub-heading 2403 9930 – '*zarda/jarda scented tobacco'*. Accordingly, the assessee started submitting Form No.1 declaring the product manufactured by it as '*chewing tobacco'*. This Court has consistently held the common parlance test continues to be one of the determinative tests for the classification of a product. In ***Commissioner of Central Excise*** *v.* ***Shri Baidyanath Ayurved chewing tobacco*** *(2009) 12 SCC 419*, this Court has held as under:

> **"49.** The primary object of the Excise Act is to raise revenue for which various products are differently classified in the new Tariff Act. Resort should, in the circumstances, be had to popular meaning and understanding attached to such products by those using the product and not to be had to the scientific and technical meaning of the terms and expressions used. The approach of the consumer or user towards the product, thus, assumes significance. What is important to be seen is how the consumer looks at a product and what is his perception in respect of such product. The user's understanding is a strong factor in determination of classification of the products.
>
> **61.** In the matters of classification of goods, the principles that have been followed by the courts—which we endorse—are that there may not be justification for changing the classification without a change in the nature or a change in the use of the product; something more is required for changing the classification especially when the product remains the same. Earlier decision on an issue inter partes is a cogent factor in the determination of the same issue. The applicability of maxim *res judicata pro veritate accipitur* in

> the matters of classification of goods has to be seen in that perspective."

121. Even the report of the Chemical Examiner clearly reflects that it is *'chewing tobacco*'. In fact, it is the Revenue that has been taking consistently inconsistent stand. In the first instance when Form No.1 was filed by the assessee declaring the product '*Mahapasand zarda scented tobacco'*, the Department drew samples from the factory premises, obtained the CRCL Report, and called upon the assessee to reclassify its product as *'chewing tobacco*' under CET SH 2403 9910 and accordingly the Form No.1 was filed by the assessee and duty paid in tune with the declaration filed. It is only after Notification No.25 of 2015 came to be issued revising the duty payable on *'zarda scented tobacco'* that fresh samples were drawn, and the Revenue started singing a new tune, and thus called upon the assessee to declare the product manufactured by it as '*zarda scented tobacco'*. In the light of communication dated 27.04.2015 by the Revenue addressed to the assessee and calling upon the assessee to classify its product as '*chewing tobacco*' and the same having been complied by the assessee it is too late in the day for the Department to take a contrary stand.

122. The order of the tribunal has taken into account the aforestated aspects to arrive at a conclusion that the declaration filed by the assessee is just and proper, which does not suffer from any infirmity either on facts or on law calling for our interference. **Hence, the appeal filed by the Department deserves to be rejected.**

VI. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX MEERUT II V. M/S SOM PAN PRODUCTS PVT. LTD. [DIARY NO. 14581/19]

123. In the present group, the Revenue is in appeal challenging the correctness and legality of order dated 25.09.2018 passed by CESTAT, Allahabad, whereby the order passed by the authorities below treating the product manufactured by the respondent as '*zarda/jarda scented tobacco'* falling under CET SH 2403 9930 and allowing the appeal as a consequence of the demands raised has been set aside.

BRIEF FACTS

124. The assessee after obtaining the registration under the CE Act declared the product manufactured by them as *'Jarda'* falling under CET SH 2403 9930 and it was assessed to duty as *'Jarda scented tobacco'*. On 30.04.2015, the assessee filed a declaration effective from 01.05.2015, declaring the product as *Jarda,* and on the same day separate rates for *'Jarda scented tobacco'* and *'chewing tobacco'* were notified having a vast difference with respect to the duty leviable on '*chewing tobacco'*. The Assistant Commissioner confirmed the duty on *'Jarda/Zarda scented tobacco'* and thereafter the assessee *vide* communication dated 12.05.2015 sought to correct its declaration and intended to shift the product to tariff heading CET SH 2403 9910 (*chewing tobacco*) instead of CET SH 2403 9930 *i.e., 'jarda/zarda scented tobacco'*. The Assistant Commissioner by communication dated 18.05.2015 rejected the request and by communication dated 20.05.2015 called upon the assessee to furnish a complete list of all ingredients used for the manufacturing of the product with write-up and flow chart duly certified. The assessee paid the duty under protest for

the month of May 2015 though he has filed a revised declaration. The Assistant Commissioner *vide* order dated 02.06.2015 rejected the proposed change in classification and raised the demand for the months of June 2015 to September 2015 and this order was confirmed by the appellate authority on 12.01.2016. A separate show cause notice dated 04.05.2016 was issued claiming differential duty on May 2015 which was confirmed *vide* order dated 16.03.2017 and the appellate tribunal set aside both the orders, namely, dated 12.01.2016 and 16.03.2017. The assessee's attempt to contend that what was manufactured by it was *'chewing tobacco'* by relying upon the sale invoices before the tribunal was successful and it was held that the product manufactured by the petitioner was '*chewing tobacco'*. Hence, the Revenue is in appeal.

SUBMISSIONS OF PARTIES

125. Ms. Nisha Bagchi, learned standing counsel for the Revenue, would contend that post facto declaration by the assessee would not be valid in view of Rule 6,7,9 of CTPM Rules. She would contend that the assessee in its declaration had clearly declared the product in

manufactured by it as, zarda scented tobacco, based on which the duty would be payable. The tribunal committed an error in proceeding on the basis that it is the case of the Revenue that assessee had manufactured Zarda by showing the same as CT though the assessee itself had declared manufacturing of zarda product. She would submit that the statutory provisions do not provide any definition of the two competing terms and the goods would be classified as per general commercial parlance. She would further contend that the assessee had failed to demonstrate cogent evidence, that it manufactured chewing tobacco during the relevant period. Hence, she prays for the appeal being allowed.

126. The learning counsel appearing for the assessee would rely upon the registration form submitted to the department whereunder the list of ingredients used in the manufacture of the product had been specified and nowhere it is stated that scent was being used for the product and as such the department ought to have rebutted the ingredients furnished by the assessee. It is submitted that the assessee never declared the manufacture of ZST and even otherwise no testing of the product is

carried out despite the request made by the assessee. It is submitted that the particulars furnished by the assessee classifying the product as *'zarda'* under CET SH 2403 9930 would by itself not make the product as such and as has been contended by the revenue, it would be the product which was manufactured by the assessee which would matter for determination of duty. Hence, the assessee has prayed for dismissal of the appeal.

DISCUSSION AND FINDINGS

127. We have heard Smt. Nisha Bagchi, appearing for the appellant-Revenue, and Ms. Seema Jain appearing for the respondent-assessee.

128. A valiant attempt was made by Ms. Nisha Bagchi to contend that the tribunal erred in appreciating the fact that the onus of establishing the change in classification was on the assessee and it ought not to have looked into the IS glossary to arrive at a conclusion that the product manufactured by the respondent-assessee was '*chewing tobacco'*. Hence, she has prayed for setting aside the order of the tribunal. Per

contra, learned counsel for the assessee has supported the order of the tribunal.

129. Having heard learned advocates appearing for the parties we notice that the tribunal has assigned the following reason for accepting the plea of the assessee: -

> "Admittedly in the present case the appellants have marketed their product as chewing tobacco and not as Jarda scented tobacco. Revenue has neither disputed the manufacturing process undertaken by the appellant which shows non-use of any scent or perfume in the product nor have made any enquiries from the dealers, shopkeepers or the ultimate consumers of the product. No evidence of procurement of Perfume or Scent as raw material and then use in the product stands produced by the. Revenue. No employee of the assessee was examined so as to establish that perfume being used for manufacture of their final product. As such the said factor of marketing of the goods as chewing tobacco leads us to inevitable conclusion apart from other reasons as discussed above, that the product in question is admittedly chewing tobacco and not Jarda scented tobacco."

130. The aforesaid conclusion arrived at by the tribunal is just and proper based on appreciation of factual matrix which would not call for interference. **Hence the appeal is dismissed.**

VII. COMMISSIONER OF CENTRAL EXCISE & ST ALWAR V. TARA CHAND NARESH CHAND [C.A NO.959 OF 2019]

BRIEF FACTS

131. In the last group, in this batch of appeals before this Court, the Revenue is calling in question the order dated 28.03.2018 passed by CESTAT in Excise Appeal No.51953 of 2017 whereunder the order dated 27.09.2017 passed by the Commissioner of Central Excise classifying the product manufactured by the respondent-assessee as *'chewing tobacco'* falling under CET SH 2403 9910, as against the claim of the Revenue of the said product falling under CET SH 2403 9930.

132. The respondent assessee had filed Form 1 declaring the product manufactured by it as *'zarda/jarda scented tobacco'* which came to be adjudicated and accordingly an order came to be passed by the Deputy Commissioner, whereunder the product of the assessee was classified by him as *'chewing tobacco'*. The assessee filled another form on 28.04.2015 describing the product as *"Jayanti zarda/jarda scented"*

classifying the product under CET SH 2403 9910, culminating in another determination order dated 05.05.2015, wherein the Deputy Commissioner classified the product as *'chewing tobacco'* under CET SH 2403 9910.

133. A search was conducted by the Director General of Central Excise in the factory of the petitioner after drawing the *panchnama* and recording the statement of Shri. Tara Chand Jain, partner of the assessee-firm. The samples were forwarded for chemical examination. The chemical examiner opined that the samples had a characteristic odour of odoriferous substances *vide* report dated 07.03.2016. Hence, a show cause notice dated 24.02.2017 came to be issued alleging that during the period March 2015 to February 2016, the assessee manufactured the product using the process in which tobacco was ground and mixed with lime, menthol, synthetic flavouring perfumes, compound, etc. and was labelled as "*Jayanti Brand Zarda".* Hence, alleging central excise duty amounting to Rs.4.81 crores was short paid and the demand came to be raised. The said show cause notice came to be adjudicated and the demand was confirmed. However, no penalty

was imposed. The tribunal by the impugned order has allowed the appeal on the ground that the department itself had declared the classification as *'chewing tobacco'* though the assessee had declared the same as *'jarda/zarda scented tobacco'* and as such by relying upon its order rendered in *Urmin products private Ltd* allowed the appeal. Hence, the Revenue has filed the present appeal.

SUBMISSIONS OF THE PARTIES

134. We have heard the arguments of Nisha Bagchi, learned standing counsel appearing for the Revenue appellant and Mr. A.R. Madhav Rao, learned counsel appearing for the respondent assessee. It is the contention of the learned counsel appearing for the Revenue that the tribunal committed an error in arriving at a conclusion that the classification of the product is *'chewing tobacco'* and not *'zarda/jarda scented tobacco'*. She would contend that the Commissioner had examined the process of manufacture and taken into consideration the test reports of CRCL in the light of tariff heading and the trade opinion, including the statement of two customers to conclude that the product is '*zarda/jarda scented tobacco'*. She would submit that the tribunal

erroneously applied the principles laid down in *Urmin products and Flakes N Flavours* without applying its mind to the present case. She would contend that the tribunal has merely relied upon the communication of the superintendent of excise whereunder the assesses's prayer to classify the product as *'zarda/jarda scented tobacco'* had been rejected and classified the same as *'chewing tobacco'* to set aside the order in original which classified the product manufactured by the assessee as '*chewing tobacco'*.

135. She would submit that there can be no dispute to the proposition that there cannot be estoppel in taxation proceedings and Section 11A of the CE Act, which permits demand within a normal period of limitation. Hence, she seeks for the appeal to be allowed.

136. Per contra, Shri A.R. Madhav Rao, learned counsel appearing for the respondent-assessee would contend that there can be no short levy for the past period, particularly in the present case, since the declaration filed by the assessee was approved. He would further contend that no appeals had been filed against the approval of the classification and said orders had become final. He would also add that

ISI's specification and glossary are applicable to determine the classification in the absence of any definition of '*chewing tobacco*' preparations for '*chewing tobacco'* and '*zarda/jarda scented tobaccot*' or any test prescribed by the CBIC. He would contend that the burden of classification or change of classification of a product is always on Revenue and the same has not been discharged. He would contend that there ought to be uniformity in classification. By relying upon the judgment of this Court in *Damodar J. Malpani Vs. CCE* reported in (2004) 12 SCC 70 in a case relating to '*chewing tobacco'* itself, it was held that where the process adopted has been scrutinized and the Revenue in the case of one assessee has classified the product as *'unmanufactured tobacco'* falling under heading 24.01 as it stood then, another assessee following the same process cannot be discriminated and there should be uniformity in classification. He would contend that verification contemplated under Rule 6(2) of CTPM rules 2010 is not confined to a verification of only the number of machines installed in the applicant's premises and the description of the product and classification of the same is also verified and this is evident from the fact wherein physical verification of the respondent's product apart

from the verification of the machines had been done when it attempted to change the classification of the product from *'chewing tobacco'* to '*zarda/jarda scented tobaccot*' and same was turned down. He would submit that notification under Section 3A for the period in question *(i.e., March 2015 to February 2016)* covered four different products each having a different deemed capacity of production and rate, which was a function of the speed of packing for some products. Therefore, the department would necessarily have to classify the appropriate tariff entry in order to pass orders determining the monthly deemed capacity and duty to be paid by the applicant. He would submit that even the monthly returns depict the product of the respondent-assessee as *'chewing tobacco'* has been scrutinized and assessed to be correct for the relevant period. By referring to Rule 12 of Central Excise Rules 2002, he would contend that filing of the returns would be applicable to notified goods under Section 3A and said returns are required to be scrutinized and assessed by which process there would be verification of the product manufactured by the assessee and classification of the same. Hence, by relying upon the following judgments he prays for the dismissal of the appeal.

a) Collector of Central Excise, Baroda vs. Cotspun Ltd. (1999) 7 SCC 633

b) Union of India vs. Delhi Cloth and General Mills 1963 Supp. 1 SCR 586.

c) Collector of Central Excise, Kanpur vs. Krishna Carbon Paper Co. (1989) 1 SCC 150

d) Coastal Paper Ltd. Vs. Commissioner of Central Excise, Vishakhapatnam (2015) 10 SCC 664

e) Parle Agro Pvt. Ltd. vs Commissioner of Commercial Tax, Trivandrum (2017) 7 SCC 540

f) Damodar J. Malpani and anr v. Collector of Central Excise (2004) 12 SCC 70

DISCUSSION AND FINDINGS

137. We have heard the learned advocates appearing for the parties and perused the records. At the outset, we would like to make it explicitly clear that the tribunal though has relied upon the judgment of *Urmin and Flakes-n-flavourz,* apart from assigning other reasons, in the facts and circumstances obtained in the present case, we have proceeded to examine the rival contentions, notwithstanding the findings recorded by the tribunal in *Urmin Products and Flakes-n-flavourz* which are the subject matter of Civil Appeal No.10159-161 of 2010 and Civil Appeal No.5146 of 2015, which has been adjudicated by us under this common order itself by assigning separate and independent reasons and the facts

of the said case are distinguished from the facts of the present case. This view also gets fortified by the very fact that in the instant case, an inquiry was conducted in respect of assessee's product and the superintendent in-charge of the respondent's factory furnished the reports to the Deputy Commissioner on 04.03.2015 after visiting the factory of the assessee, inspected the machines and the product manufactured, since the assessee had declared in Form 1 to the effect that the product manufactured by it is *'zarda/jarda scented tobacco'*. In the said report the superintendent has opined as under:

> "As regards the assessee's letter dated 02.03.2015 regarding amendment in their Registration by changing the CETSH of their final product form 24039910 (Chewing Tobacco) to 24039930 (Jarda Scented Tobacco), it is submitted that looking to the production process/ingredients the product is already correctly classified under CETSH 24039910 and does not merit classification under the CETSH 24039930, as claimed by the assessee."

138. Thus, it is clear that the stand of the assessee has been consistent to the effect that product manufactured by it is to be classified as *'zarda/jarda scented tobacco'* and at the insistence of the jurisdictional Deputy Commissioner the assessee was classifying the goods under CET SH 2403 9910 *i.e., 'chewing tobacco',* for which there was also an

order of determination passed under Rule 6(2) of CTPM rules. Whereas in the other matters, namely *Urmin and Flakes-n-Flavourz,* the facts were entirely different. In *Urmin Products* the assessee had declared the product as *'chewing tobacco'* and then changed the classification to *'zarda/jarda scented tobacco'* and again came back to the original position of declaring it or classifying it as *'chewing tobacco'*. These classifications in *Urmin Products* were at the behest of the assessee himself. In *Flakes-n-Flavourz,* the assessee was alleged to be manufacturing '*zarda/jarda scented tobacco'* and clearing it as *'chewing tobacco',* and on facts it was found that there were additives added to the tobacco. In the said case this Court on facts held that there was no wilful suppression attributable to the assesssee and the Revenue had failed to establish the product as 'zarda *scented tobaccot*'.

139. In the instant case the assessee had clearly declared his product as *'zarda/jarda scented tobacco'* falling under sub-heading 2403 9930 in Form 1 filed and based on the said declaration, capacity determination order dated 04.03.2015 under rule 6(2) had been passed re-classifying the product as *'chewing tobacco'*. Accordingly, for the

period April 2015 in Form-1 the assessee had described the product as '*Jayanti Zarda Scented*- 2403 9910'. However, in the capacity determination order dated 05.05.2015, the Deputy Commissioner classified the goods as '*chewing tobacco'*. As such, there was no misstatement or suppression of facts, collusion, or fraud in the instant case and hence on facts, the principles enunciated in *Urmin*'s case is distinguishable. It may be noted that this court in the case of *CCE vs. Damnet Chemicals Private Ltd*. (2007) 7 SCC 490 had held:

> **"26.** In the circumstances, we find it difficult to hold that there has been conscious or deliberate withholding of information by the assessee. There has been no wilful misstatement much less any deliberate and wilful suppression of facts. It is settled law that in order to invoke the proviso to Section 11-A(1) a mere misstatement could not be enough. The requirement in law is that such misstatement or suppression of facts must be wilful. We do not propose to burden this judgment with various authoritative pronouncements except to refer the judgment of this Court in *Anand Nishikawa Co. Ltd.* v. *CCE* [(2005) 7 SCC 749 : (2005) 188 ELT 149] wherein this Court held : (SCC p. 759, para 27)
>
> "*27.* … we find that 'suppression of facts' can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. *There must be some positive act from the side of the assessee to find wilful suppression.*"

(emphasis supplied)

> **27.** It is clear from the material available on record that the Excise Authorities had inspected the manufacture process, collected the necessary information and details from the respondent assessee and even collected the samples and sent for chemical analysis. The authorities were aware of the tests and analysis reports of the products manufactured by the respondent assessee. The relevant facts were very much within the knowledge of the Department authorities. The Department did not make any attempt to lead any evidence that there was any wilful misstatement or suppression of facts with intent to evade payment of duty."

140. In the facts of the present case, there has been no penalty levied under Rule 26 on the ground that there has been no intent to evade duty. In fact, the commissioner in his order dated 27.09.2017 concludes at para 48.2 to the following effect:

> "..in view of the above there is no fraud or collusion or any wilful misstatement or separation of facts with intent to evade payment of duty to invoke the provisions of Section **11A (4)** of Central Excise Act, 1944 in the present case."

141. It is also pertinent to note that on 04.03.2015 the respondent-assessee sought to make a change in the registration certificate and claimed that the product manufactured by it was *zarda/jarda.* However, the appellant-Revenue called upon the respondent to withdraw the application for registration as '*zarda'* and to show it only as *'chewing*

tobacco' and thereafter application showing the product as *'chewing tobacco'* came to be filed on 06.07.2015, and accordingly said application was allowed on 23.07.2015 *vide* annexure A-45 (volume II of the counter affidavit). Thus, the registration certificate itself reflects the product as *'chewing tobacco'*. This court in the case of *CCE vs. Tata Tech Ltd* (2008) 11 STR 449 (SC) has held;

> "there cannot be a demand against the classification under which the product is registered without undoing the classification of the product in the registration certificate".

142. **For the reasons aforestated we are of the considered view that the findings of the tribunal warrant no interference by this Court and the appeal has to fail.**

143. We place on record our deep appreciation for the able assistance rendered by the learned counsel appearing for the parties, in not only making available compilation of statutory provisions, notifications, and circulars prevalent at the relevant time, but also their erudite elucidation of arguments which are noted hereinabove, which enabled this Court to arrive at the conclusions recorded hereinabove.

Resultantly, we proceed to pass the following:

O R D E R

(a) Civil Appeal Nos.10159-10161 of 2010, Civil Appeal No…….. of 2023 arising out of Diary No.44912 of 2019 and Civil Appeal No……. of 2023 arising out of Dairy NO.6888 of 2020 are hereby allowed.

(b) Civil Appeal No. 5146 of 2015, Civil Appeal No. 2469 of 2020 along with Civil Appeals arising out of Diary No.(s) 3492, 2810, 3484, 3513, 3536, 3544, 3545 and 3547 of 2020, Civil Appeal No. 3596 of 2023, Civil Appeal No. arising out of Diary No. 14581 of 2019 and Civil Appeal No. 959 of 2019 are hereby dismissed.

(c) Civil Appeal No. _____ of 2023 arising out of Diary No. 3487 of 2020 stands remitted to the Tribunal for adjudication afresh in light of observations made in paragraph no. 110 and 113 of group number – 4 appeals (*i.e., Dharampal Premchand group*)

(d) Costs made easy.

……..J.
(S. Ravindra Bhat)

…….J.
(Aravind Kumar)

New Delhi,
October 20, 2023