A SUDHAKAR VITHAL KUMBHARE

v.

STATE OF MAHARASHTRA AND ORS.

NOVEMBER 18, 2003

B [V.N. KHARE, CJ., S.B. SINHA AND DR. AR. LAKSHMANAN, JJ.]

Constitution of India, 1950:

C *Article 342—Status of Scheduled Tribe on bifurcation of State—Part of area inhabited by 'Halba' Tribe in State of Madhya Pradesh merged in State of Maharashtra—'Halba' Tribe recognized by both the States as Scheduled Tribe—Junior Engineer, being resident of Madhya Pradesh and belonging to 'Halba' tribe of the region which was bifurcated, employed in Maharashtra Electricity Board and promoted as Assistant Engineer against reserved post—*
D *Later on, reverted on the ground that he was not entitled to reservation benefit in State of Maharashtra—Held, the Maharashtra State Electricity Board acting upon the direction of the State Government has reverted the appellant without referring the matter to the Scrutiny Committee which was not the correct way to deal with the appellant's case—In such a situation the employer was required to refer the question before the Scrutiny*
E *Committee—In view of the fact that the appellant's case was not referred to the appropriate Committee, the judgment and order under challenge is set aside—It will be open to Maharashtra State Electricity Board to refer the matter to Scrutiny Committee for verifying eligibility of the employee—Employee shall be reinstated forthwith as Assistant Engineer and shall continue*
F *to hold the said post till the matter is decided by the Committee—Constitution (Scheduled Tribes) Order, 1950—States Reorganisation Act, 1956.*

Kumari Madhuri Patil and Anr. **v.** *Additional Commissioner, Tribal Development and Ors.,* **[1994] 6 SCC 241 and** *Punit Rai* **v.** *Dinesh Chaudhary,* **JT [2003] Supp. 1 SC 557, relied on.**

G

Action Committee on Issues of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra and Anr. **v.** *Union of India and Anr.,* **JT (1994) 4 SC 423;** *U.P. Public Service Commission, Allahabad* **v.** *Sanjay Kumar Singh* **JT (2003) 8 SC 79;** *Director of Tribal Welfare* **v.** *Laveti Giri,* **[1995] 4 SCC 32 and** *Kumari Madhuri Patil and Anr.* **v.** *Additional*
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Commissioner, Tribal Development, Thane and Ors., (Second), **[1997] 5 SCC 437, referred to.** A

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5186 of 2001.

From the Judgment and Order dated 23.3.2001 of the Bombay High Court in W.P.No. 2368 of 1989. B

V.A. Mohta and D.M. Nargolkar for the Appellant.

S.V. Deshpande, S.S. Shinde, Mukesh K. Giri and A.S. Bhasme for the Respondents.

C

The following Order of the Court was delivered :

The appellant is originally a resident of village Sawargaon, post Pandhurna, District Chhindwara in State of Madhya Pradesh. It is not disputed that as a result of State reorganization, a part of the said district being Chandrapur, which was originally in the State of Madhya Pradesh, had gone D into the State of Maharashtra. Earlier in the Presidential Scheduled Tribes Order issued in the year 1950 the tribe 'Halba' was recognized as Scheduled Tribe in the District of Chhindwara in the State of Madhya Pradesh. After reorganization, when Chandrapur was included within the territory of State of Maharashtra, the caste 'Halba' was recognized as Scheduled Trible also in the State of Maharashtra. It is also not disputed that the appellant herein was E brought up and educated in District of Chhindwara. Subsequently, he applied in response to an advertisement for selection and appointment in the Maharashtra State Electricity Board for the post of Junior Engineer [Civil]. It is not disputed that he was selected and appointed against the non-reserved vacancy on the basis of merit in the said post. In the year 1987, the appellant F was promoted to officiate as Assistant Engineer (Civil) against a reserved vacancy on the basis of a certificate of being belonging to Halba tribe issued by the competent authorities of the State of Madhya Pradesh. On 22nd August, 1988, respondent no. 2 herein issued him show cause notice as to why he should not be reverted from the post of Assistants Engineer as he was not entitled to the benefit of reservation for Scheduled Tribe in the State G of Maharashtra. The appellant submitted an explanation to the said show cause notice justifying his promotion against the reserved post. Despite that explanation, the appellant was reverted from the post the of Assistant Engineer to the post of Junior Engineer.

H

A Aggrieved, the appellant filed a petition under Article 226 of the Constitution Challenging the order of reversion. The High Court by its judgment and order dated 23rd March, 2001 dismissed the petition on the ground that the petitioner who comes from the State of Madhya Pradesh though belonged to Scheduled tribe 'Halba' which is recognized as such in the State of
B Maharashtra is not entitled to benefit of reservation. It is against the said judgment of the High Court, the appellant is in appeal before us.

Mr. V.A. Mohta, learned senior counsel appearing for the appellant, urged that the question as to whether the appellant was entitled to the benefit of reservation in the State of Maharashtra ought to have been referred to the
C Statutory Committee constituted on the basis of directions issued by this court in *Kumari Madhuri Patil and Anr.* v. *Addl. Commissioner, Tribal Development and Ors.*, [1994] 6 SCC 241, where it was directed that in course of employment if any dispute arises as regard to the benefit of reservation the matter is required to be referred to a Scrutiny Committee.

D It is no doubt true that a Scheduled Tribe notified in one State may not be given the benefits therefor in another State having regard to the plain expression 'in relation to that State' in Article 342 of the Constitution. {See Action Committee on issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the *State of Maharashtra and Anr.* v. *Union of India and*
E *Anr.*, JT (1994) 4 SC 423 and *U.P. Public Service Commission, Allahabad* v. *Sanjay Kumar Singh,* JT (2003) 8, SC page 79.

But the question which arises for consideration herein appears to have not been raised in any other case. It is not in dispute that the Scheduled Castes and Scheduled Tribes have suffered disadvantages and denied facilities
F for development and growth in several States. They are required protective preferences, facilities and benefits *inter alia* in the form of reservation, so as to enable them to compete on equal terms with the more advantageous and developed sections of the Community. The question is as to whether the appellant being a Scheduled Tribe Known as Halba/Halbi which stands recognized both in the State of Madhya Pradesh as well as in the State of
G Maharashtra having their origin in the Chhindwara region, a part of which, on States' reorganization, has come to State of Maharashtra, was entitled to the benefit of reservation? It is one thing to say that the expression 'in relation to that State' occurring in Article 342 of the Constitution of India should be given an effective or proper meaning so as to exclude the possibility that a
H tribe which has been included as a Scheduled Tribe in one State after

consultation with the Governor for the purpose of the Constitution may not get the same benefit in other State whose Governor has not been consulted; but it is another thing to say that when an area dominated by members of the same tribe belonging to the same region which has been bifurcated, the members would not continue to get the same benefit when the said tribe is recognized in both the States. In other words, the question that is required to be posed and answered would be as to whether the members of the Scheduled Tribe belonging to one region would continue to get the same benefits despite bifurcation thereof in terms of States' Reorganization Act. With a view to find out as to whether any particular area of the country was required to be given protection is a matter which requires detailed investigation having regard to the fact that both Pandhurna in the District of Chhindwara and the part of area of Chandrapur at one point of time belonged to the same region and under the Constitutional Scheduled Tribes Order 1950 as it originally stood the Trible Halba/Halbi of that region may be given the same protection. In a case of this nature the degree of disadvantages of various elements which constitute the input for specification may not be totally different and the State of Maharashtra even after reorganization might have agreed for inclusion of the said Trible Halba/Halbi as a Scheduled Tribe in the State of Maharashtra having regard to the said fact in mind.

Here we find that the Maharashtra State Electricity Board acting upon the direction of the State Government has reverted the appellant without referring the matter to the Scurtiny Committee which was not the correct way to deal with the appellant's case. In fact, in such a situation the employer was required to refer the question before the Scrutiny Committee which admittedly had been constituted and established for coming to the matter. We may notice that in *Kumari Madhuri Patil's* case [supra] this Court observed:-

> "The admission wrongly gained or appointment wrongly obtained on the basis of false social status certificate necessarily has the effect of depriving the genuine Scheduled Castes or Scheduled tribes or OBC candidates as enjoined in the Constitution of the benefits conferred on them by the Constitution. The genuine Candidates are also denied admission to educational institutions or appointment to office or posts under a State for want of social status certificate. The ineligible or spurious persons who falsely gained entry resort to dilatory tactics and create hurdles in completion of the inquiries by the scrutiny committee. It is true that the applications for admission to educational institutions are generally made by a parent, since on

A that date many a time the student may be a minor. It is the parent or the guardian who may play fraud claiming false status certificate"

Similar observation have been made in Director of *Tribal Welfare* v. *Laveti Giri,* [1995] 4 SCC 32. This aspect of the matter has been noticed following the observation of this Court in *Kumari Madhuri Patil and Anr.* v. *Addl.* B *Commissioner Tribal Development, Thane and Ors.*, (second) [1997] 5 SCC 437] in *Punit Rai* v. *Dinesh Chaudhary,* JT (2003) {Suppl. 1} SC 557 at 574]:-

3. "As regards prayer (b) read with direction no. (iv) of the order of this Court, we too appreciate the inconvenience caused due to vast area of the State. Therefore, instead of one committee of three officers, C there will be three Scheduled tribe/Caste Scrutiny Committees comprising of five member with quorum of three members, as suggested in para 4 of the direction, to take a decision. At Pune, Nasik and Nagpur, six caste scrutiny committees for SCs, Denotified Tribes, Nomadic Tribes, other Backward Classes and the Special Backward D category in existence at Mumbai, Pune, Nasik, Aurangabad, Amravati and Nagpur would continue to scrutinise the certificate issued by the respective officers and take a decision in that behalf. In this regard, it is also suggested by Shri Dholakia, learned senior council for the applicant, that in case any certificate has been wronglfully refused by the certificate issuing authority, the aforestated committees also would E go into the question and decide in that behalf, whether refusal was wrongful and in case it finds that the refusal was wrongful, they are at liberty to direct the authority to grant the certificate.

5. With regard to prayer (d), along with the vigilance cell, one research officer/tribal development or social welfare officer would be F associated in finding the social status of eligibility of the officers."

In view of fact that the appellant's case was not referred to the appropriate Committee, the judgment and order under challenge deserves to be set aside. It will be open to the Maharashtra State Electricity Board to refer the matter to the Scrutiny Committee for verifying the eligibility of the appellant. We G direct that the appellant shall be reinstated forthwith as Assistant Engineer and shall continue to hold the said post till the matter is decided by the Committee. The appeal is allowed on the aforementioned terms. There shall be no order as to cost.

H R.P. Appeal allowed.

A

ITW SIGNODE INDIA LTD.

v.

COLLECTOR OF CENTRAL EXCISE

NOVEMBER 19, 2003 B

[V.N. KHARE, CJ., S.B. SINHA AND DR. AR. LAKSHMANAN, JJ.]

Central Excises and Salt Act, 1944; S.11-A and amendments made thereunder/Central Excise Tariff Act, 1985; Tariff Items 26AA(iii), 68, 7211.31, 7308.90/Central Excise Rules, 1944; Rules 9(2) and Amendments made thereunder and 173B: C

Manufacture of box strappings from duty paid cold rolled steel strips as input—Resultant product—Classification of—Assistant Collector held that since resultant product is being manufactured by doing painting/waxing on input material, description of final product does not change—No further duty liability arises—Amendment in Section 11A of the Act—Affirmed by the Appellate Authority—Reversed by the Tribunal—On appeal, Held: Amended provisions of Law facilitate Revenue authorities to determine correctness of classification of the product by re-opening of approved classification list— A legal fiction created for recovery of short levy/non-levy—Hence, amended provision of Law, a valid piece of legislation. D E

Extended period of limitation for short levy—Invoking of—Held, It could be invoked only on discovery of positive acts of fraud on the part of assessee—Limitation involves question of jurisdiction—To be determined having regard to both facts and law—In absence of any act of fraud, extended period of limitation could not have been invoked—Even if short levy, assessee could adjust the same from MODVAT credit on duty paid on input material—Matter remitted to Tribunal for consideration afresh in accordance with law—Limitation Act, 1963—Interpretation of Statutes. F

G

Curative and Validating Statutes—Operation of—Held: Retrospective effect could be given—However, scope of validating Act varies from case to case.

Words and Phrases:

 H

A *'Such'—Meaning of in the context of Section 11A of the Central Excise Act.*

Appellant-Assessee, a manufacturer, deals in manufacturing of box strappings from duty paid cold rolled steel strips as input raw material. Assessee informed the Revenue authorities concerned that the product falls B under tariff item No.26AA(iii) of the Central Excise Tariff Act and no excise duty was leviable. The authority responded that the product would be classifiable under Tariff Item No.68 and not under Tariff Item No.26AA (iii) of the Act. However, Assistant Collector held that the assessee had discharged its duty/liability by paying duty for cold rolled steel strips, the input material C under Tariff Item No. 26AA (iii) and since the resultant product continues to be same, no further duty liability arose thereon.

In the meanwhile, assessee had filed a classification list disclosing processes used in the manufacture of the product. The list was approved by the concerned authority. But the Revenue issued a show cause notice to the D assessee for levy and recovery of differential amount of duty on the product as the product fall under Tariff Item No.68 of the Act. In appeal, the Collector and the Appellate Authority affirmed the order of Assistant Collector. In appeal, Tribunal reversed the order. Hence the present appeal.

On the issue of 'short levy of excise duty', Constitution Bench of E Supreme Court in the matter of *Collector of Central Excise, Baroda* v. *Cotspun Ltd.*, [1999] 7 SCC 633 overruled its earlier decision in *Ballarpur Industries Ltd.* v. *A.C. of C.C.E.*, [1995] Supp. 3 SCC 429 upholding the law laid down by the Court in *Rainbow Industries (P) Ltd.* v. *CCE, Vadodra,* [1994] 6 SCC 563 as correct law. Parliament accordingly made certain amendment F under Section 11A of the Central Excise Act, 1944 and the same was given retrospective effect. Assessee, in the present case, challenged the said amendment and the question was considered by this Court in *Easland Combines, Coimbtore* v. *CCE, Coimbatore,* [2003] 3 SCC 410. The Court upheld the amendment.

G When the present matter was placed before the Division Bench, the Bench did not agree with the view taken by the Court in *'Easland Combines'* case and directed to refer the matter to a Bench of 3 Judges. Hence the matter came before the present Bench.

It was contended for the appellant-assessee that the basis of the decision H in *Cotspun* case was not taken away by introducing amendment in Section 11

A of the Act; that levy of excise duty on the basis of an approved list would not be construed as short levy, thus, differential duty could not be recovered and Section 11-A, would have no application; that the process undertaken on cold rolled strips to get the final product, do not amount to 'manufacture' of the final product, since the product would not attain a new and distinct character; that box strappings, the final product, could appropriately be classified under the heading 7211.31 as cold rolling strips only and not under heading No. 7308.90; that extended period of limitation as prescribed under Section 11A of the Act would have no application since there was no short levy occasioned on account of fraud/collusion/wilful suppression of facts with an intent to evade duty; and that in case the final product is held to be dutiable, the assessee should have been allowed to avail MODVAT credit on duty paid on input material.

On behalf of the respondent, it was submitted that the basis of judgment of the Supreme Court in *Cotspun* case had been removed by making necessary amendment in Section 11A of the Central Excise Act; that as per amended provisions of the Act, even the correctness of approved classification list could be challenged/questioned; and that since several processes had been undertaken on input steel strips to get the final product, the same amounts to manufacture.

Partly allowing the appeal, the Court

HELD: 1.1. Section 11A of the Central Excise Act deals with a case when *inter alia* excise duty has been levied or has been short-levied or short-paid. The word "such" occurring after the words "whether or not" refers to non-levy, non-payment, short-levy or short-payment or erroneous refund. It is, therefore, not correct to say that the word "such" indicates only such short-levy which has been held to be non-existent in *Cotspun* case having regard to Rule 173B of the Central Excise Rules, 1944 . Such short-levy or non-levy may be on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods; that any approval made in terms of Rule 10 of the Act, in the event, any mistake therein if detected, would also come within the purview of the expression "such short-levy or short-payment". [779-D-E-F]

Collector of Central Excise, Baroda v. *Cotspun Ltd.*, [1999] 7 SCC 633, referred to.

1.2. It is a well-settled principle of law that in case of a conflict between

A a substantive Act and delegated legislation, the former shall prevail inasmuch as delegated legislation must be read in the context of the primary/legislative Act and not the *vice-versa*. [779-C]

1.3. The procedure laid down under Rule 173B of the Rules has specifically been included in the Act. Furthermore, by reason of the amended B Act a provision has been made for reopening the approved classification lists. It is a procedural provision in terms whereof statutory authorities are required to determine as to whether the earlier classification was correctly done or not. The authority upon giving an opportunity of hearing the parties, may come to the conclusion that decision on the approval granted need not be reopened C and even if the same is reopened, the reasons therefor have to be stated. [779-H; 780-A-B]

1.4. Parliament, by making an amendment, had merely provided that an approval on the basis of a classification list *inter alia* in case of a short-levy can be recovered if a finding is arrived at that the goods had undergone a D short-levy. For the said purpose, clause 110 of the Finance Act, validating actions taken under Section 11A can be taken into consideration whereby and whereunder a legal fiction is created. Cotspun case was decided when the matters relating to classification, approval thereof as also short-levy or upon detection of a mistake were governed by the Central Excise Rules. Rule 10 and Rule 173 B of the Rules were to be read in conjunction with each other E and the Constitution Bench in the said matter merely followed the principle of interpretation of statute. A different situation has arisen now having regard to the fact that not only the substantive provision dealing with the consequence of non-levy, non-payment or short levy or short-payment or erroneous refund but also has laid down the procedure therefor. [780-B-C; F]

F *Collector of Central Excise, Baroda* v. *Cotspun Ltd.*, [1999] 7 SCC 633, followed.

Bhavnagar University v. *Palitana Sugar Mill Pvt. Ltd. and Ors.*, [2003] 2 SCC 111; *State of Karnataka* v. *Vishwabharathi House Building Coop.* G *Society and Ors.*, [2003] 2 SCC 412; *High Court of Judicature for Rajasthan* v. *P.P. Singh and Anr.*, [2003] 4 SCC 239 and *Dipak Chandra Ruhidas* v. *Chandan Kumar Sarkar*, [2003] 7 SCC 66, relied on.

1.5. A statute, it is trite, must be read as a whole. A statutory Act may be enacted prospectively or retrospectively. A retrospective effect indisputably H can be given in case of curative and validating statute. In fact curative statutes

by their very nature are intended to operate upon and affect past transaction having regard to the fact that they operate on conditions already existing. However, the scope of the validating Act may vary from case to case. Hence, Section 11A of the Act as amended is a valid piece of legislation.

[780-G-H; 781-A]

2.1. This Court in the peculiar facts and circumstances of the present case need not go into the question as to whether the processes undertaken by the assessee would amount to manufacture or whether the classification of goods under sub-heading 7308.90 is correct, since the question as regards limitation and availability of MODVAT had not been considered. The question of limitation involves a question of jurisdiction. The findings of fact on the question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question is to be determined having regard to both fact and law involved therein. The Tribunal committed a manifest error in not determining the said question, particularly, when in the absence of any finding of fact that such short-levy of excise duty related to any positive act on the part of the appellant by way of fraud, collusion, wilful mis-statement or suppression of facts, the extended period of limitation could not have been invoked and in that view of the matter no show cause notice in terms of Rule 10 of the Rules could have been issued. Even if the short-levy, if any, is to be recovered, the appellant was entitled to raise a question that he was entitled to adjust the duty upon taking MODVAT credit of the duty paid on cold rolled steel strips. These aspects of the matter are required to be gone into by the Tribunal. Hence, the impugned judgment cannot be sustained and is set aside and the matter is remitted to the Tribunal for consideration thereof afresh in accordance with law.

[781-B-C; 782-G-H; 783-A-B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7868 of 1995.

From the Judgment and Order dated 6.4.95 of the Central Excise Customs and Gold Control Appellate Tribunal, New Delhi in F.O.No.E/180 of 1995-BI.

V. Lakshmikumaran, Alok Yadav and V. Balachandran for the Appellant.

Dhruv Mehta, Ms.Vibha Dutta Makhija and B.K. Prasad for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. The primal question involved in this appeal which arises out a judgment and order of the Customs, Excise & Gold (Control) Appellate Tribunal dated 6.4.1995 revolves round the effect of a validating statute.

A *BACKGROUND FACTS:*

The appellant manufactures and deals in box strappings. For the said purpose they receive duty paid cold rolled steel strips. Several processes are undertaken for manufacturing the end product.

B The appellant allegedly informed the Superintendent of Central Excise about the processes undertaken by them contending that the resultant product falls under Tariff Item No. 26AA(iii) and no further excise duty is leviable thereupon. The Assistant Collector by a letter dated 25.6.1983 stated that the box strappings made out of the duty paid cold rolled steel strips would be C classifiable under Tariff Item 68 and not under Tariff Item 26AA(iii). The appellant protested thereagainst by a letter dated 2.7.1983 *inter alia* contending that having regard to the ISI specifications and certain judicial pronouncements, Tariff Item 68 would not be applicable. The Assistant Collector by an order dated 11.7.1983 held:

D "Considering all aspects, the cold rolled strips known as box strappings continue to be cold rolled strips under Tariff item 26AA (iii). The painting and waxing on the product does not change the classification of the product.

As the raw material, cold rolled strips has discharged its duty E liability under T.I. 26AA(iii) and the resultant product continues to be cold rolled strips under T.I. 26AA (iii), no further duty liability arises."

The said order is said to have become final. Thereafter on or about 4.2.1986 a classification list was filed by the appellant effective from 1.3.1986 stating that box strappings are made by cutting duty paid steel strips under F the column "particulars of other goods produced or manufactured and intended to be removed by the assessee". Reference in this behalf was also made to the order of the Assistant Collector dated 11.7.1983. The said classification list filed by the appellant was approved by the Assistant Collector. However, by a notice dated 8.4.1987, the Collector, Central Excise called upon the Appellant herein to explain as to why processes undertaken by them would G not amount to manufacture with immediate effect and why an amount of Rs. 1,13,82,247 should not be levied on the basis that the goods should be classified under chapter sub-heading 7308.90 of the Central Excise Tariff Act, 1985 upon invoking Rule 9(2) of the Central Excise Rules, 1944 read with the provisions of Section 11A of the Central Excise Rules.

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The appellants contend that the issue as regard classification was raised with the Department even in 1983, whereupon the Assistant Collector vide his letter dated 11.7.83 held that the process carried out by the appellants does not amount to manufacture since the product continues to be a strip and accordingly there was no change in the classification, i.e., it will fall under Tariff Item 26AA(iii). This order has not been challenged by the department and thus it has become final and conclusive. Thereafter, all along the appellants have filed classification lists right from 1986 claiming the classification as strips under Tariff Item 26AA under the old Tariff according to the order passed by the Assistant Collector. All the classification lists described the process manufacture adopted by the appellants. This was finally approved by the department without any modification in favour of the appellants. This classification continued even for the period effective from March 1987. Thus, no demand could have been raised against the appellant under Section 11A for the past period since there was no short levy and in any event no suppression can be attributed to the appellants.

A reply to the show cause was filed by the appellant highlighting the processes undertaken. The Collector by his order dated 24.9.1987 held that the processes undertaken by the appellant do not amount to manufacture and as such their product is classifiable under Chapter 72 only. An appeal thereagainst was filed by the respondents before the Appellate Tribunal.

The matter was heard by three members of the Tribunal who constituted the Bench. Three separate orders in the matter were passed on 6.4.1995. The Member (Judicial) in his order proposed to remit the matter to the Collector for a *de novo* consideration on the merit; whereas the Vice-President and the Member (Technical) decided the merit of the matter against the appellant. The majority of the Appellant Tribunal classified the box strappings in running length and in coil under heading 73.08 as articles of iron or steel. However, none of the members took into consideration the question as to whether the demand made by revenue was barred by limitation. Aggrieved thereby and dissatisfied therewith the appellant is in appeal before us.

REFERENCE TO CONSTITUTION BENCH AS REGARD SHORT-LEVY:

Having regard to the conflict of decision in *Ballarpur Industries Ltd.* v. *Asstt. Collector of Customs & Central Excise,* [1995] Supp. 3 SCC 429 and *Rainbow Industries (P) Ltd.* v. *Collector of Central Excise, Vadodara,* [1994] 6 SCC 563 the question was referred to a Constitution Bench. This Court in

A *Collector of Central Excise, Baroda* v. *Cotspun Ltd.*, [1999] 7 SCC 633 (wherein one of us V.N. Khare, CJI was a member) overruled the decision of this Court in *Ballarpur Industries* (supra) and held that the *Rainbow Industries* (supra) has correctly laid down the law.

AMENDMENT IN SEC. 11A:

B

The Parliament thereafter amended Section 11A of the Central Excise Act, 1944 by Act No. 10 of 2000 which was published in the Gazette of India on 12.5.2000 and the same was given a retrospective effect and retroactive operation from 27.12.1985.

C *REFERENCE TO THIS BENCH REGARDING VALIDATING ACT:*

The appellants herein thereafter questioned the vires of the said provision. It is also not in dispute that the said question came up for consideration before a two-Judge Bench of this Court in *Easland Combines, Coimbatore* v. *Collector of Central Excise, Coimbatore,* [2003] 3 SCC 410 D wherein the validity of the Amendment was upheld.

However, when this matter was placed before another Division Bench it referred the matter to a three-Judge Bench by an order dated 20th February, 2003 opining:

E

"Earlier this appeal was adjourned awaiting the judgment of this Court in C.A. No. 2693 of 2000, *Easland Combines* v. *Collector of Central Excise, Coimbatore*, (2003) 152 E.L.T. 39 (S.C.). When this appeal is taken up for hearing today, Mr. Bajpai, the learned Counsel appearing for the Revenue, invited our attention to the judgment in *Easland* F *Combines* (supra) and submitted that the point involved in this appeal is covered by the said judgment.

In *Collector of Central Excise, Baroda* v. *Cotspun Ltd.*, [1999] 7 SCC 633], a Constitution Bench of this Court laid down as follows :

G

"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 ceased to be such.

H

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." A

The Parliament has amended Section 11A of the Central Excise Act, 1944 by Finance Act, 2000 (10 of 2000) with effect from November 17, 1980 with a view to change the basis of the judgment in the aforementioned case. The question whether the amendment has changed the basis of the judgment in *Cotspun's* case (supra), is the question that arises in this case. The same question came up for consideration of this Court in *Easland Combines* (supra). A bench of two learned Judges took the view that the amendment which conferred power to correct the errors or mistakes in approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods cannot be said to be unreasonable. It was further held that with retrospective effect, the legislature has empowered the Central Excise Officer to set at naught the erroneous approval of classification list or acceptance of price list or assessment order, and, on that premise, it was laid down, B C D

"Hence, it is held that in view of the amendment of Section 11A(1), the decision rendered by this Court in Cotspun's case (supra) would not be a good law. Show cause notice for correcting errors or mistakes in approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under the provisions of the Act or the Rules made thereunder could be issued within the prescribed period." E

Having gone through the judgment carefully and given our anxious consideration to the said judgment in *Easland Combines* (supra), we are unable to agree with the view taken by the bench of two learned Judges in regard to either the import of the amendment or the effect thereof and, in our view, the amendment does not alter the basis of the judgment in *Cotspun's* case (supra). F G

We, therefore, consider it appropriate to refer the appeal to a bench of three learned Judges.

The Registry is directed to obtain the orders of Hon'ble the Chief Justice for listing the case before a bench of three learned Judges." H

A That is how the matter is before us.

SUBMISSIONS:

Mr. V. Lakshmikumaran, the learned counsel appearing on behalf of the appellant would submit that by reason of the amendment made in Section 11A B of the Act, the basis of the decision in *Cotspun* (supra) had not been taken away. The learned counsel would urge that in *Cotspun* (supra) it has categorically been held that Rule 10 which was in *pari materia* with Section 11A of the Act as unamended did not deal with classification lists or related to the reopening of the draft classification lists which having been exclusively C provided for Rule 173 B, by amending Section 11A the basis of the said judgment cannot said to have been removed.

The learned counsel would argue that in Cotspun (supra) it has not only been held that Sub-Rule (5) of Rule 173B deals with classification lists but therein the question as regard different stages for correct levy had been D laid down.

Mr. Lakshmikumaran would contend that levy of excise duty on the basis of an approved classification list would not be a short levy and as such differential duty could not be recovered on the said premise and in that view of the matter Section 11A of the Act will have no application.

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Submission of the learned counsel is that Section 11A of the Act as amended only provides that even if the short levy is based on the approved classification list, show cause notice can be issued, but the same cannot be said to be sufficient to get over the basis of the judgment/Constitution Bench in *Cotspun* (supra). Once it is held in *Cotspun* (supra), Mr. Lakshmikumaran F would argue, that the levy based on the approved classification list is not short levy, the entry point in Section 11A must be held to have been closed. According to the learned counsel, by reason of the amendment as also the retrospective effect given thereto the short levy having been redefined for the purpose of Section 11A contrary to what had been held in *Cotspun* (supra), G it must be held that even now there is no short levy of duty.

The learned counsel further submitted that the Tribunal misdirected itself in holding that the processes undertaken by the appellants on the duty paid cold rolled steel strappings amounts to manufacture in terms of Section 2(f) of the Central Excise Act, 1944.

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According to the learned counsel, having regard to the processes undergone the resultant product would not attain any new and distinct character so as to warrant fresh levy of duty. In other words, Mr. Lakshmikumaran would contend, that the characteristics of cold rolled strip which is the starting material are retained in the box strappings. Relying on the decision of *Gujarat Steel Tubes Ltd.* v. *State of Kerala,* (1989) 42 ELT 513 it was urged that galvanization of pipes undertaken for the purpose of making them weather proof would not bring into existence a new commodity and even by a circular dated 9.2.1994 the Board of Excise and Customs has clarified that the process of galvanization does not amount to manufacture.

As regard question of classification , the learned counsel would submit that box strappings is classifiable under 7211.31 as strip only and not under 7308.90. Heading 7308, it was contended, covers other articles of iron or steel and in that view of the matter, the box strappings can be called as article of steel. Even after the processes undertaken for the end product, the box strappings remain as strips. It was argued that in any event having regard to the fact that heading 7308 covers other articles of iron and steel covering articles of steel in individual pieces like bottom steel, nails, rivets, ranges etc, it cannot be equated with the product in question, i.e., box strappings which are in running length in coil form and not individual pieces. In any view of the matter, box strappings being covered as cold rolled strips i.e. IS: 5872-1973, the same is not classifiable under 7308.90.

The learned counsel would contend that in the instant case, the proviso appended to Section 11A of the Act is not attracted inasmuch as the extended time period specified thereunder would have application only when the short levy is occasioned on account of fraud, collusion, willful mis-statement or suppression of facts with an intent to evade payment of duty. In that view of the matter the period of limitation for issuing a show cause notice would be six months and not five years. In support of the aforementioned contention, reliance has been placed on *Padmini Products Ltd.* v. *CCE,* (1989) 43 ELT 195, *P&B Pharmaceuticals Ltd.* v. *CCE,* (2003) 153 ELT 14 and *Pushpam Pharmaceuticals Ltd.* v. *CCE,* (1995) 78 ELT 401.

In this connection, the learned counsel has drawn our attention to the fact that the issue of classification had been raised by the appellant since 1983 and the same had been approved and even received the seal of approval by the Collector.

A The learned counsel would lastly contend that even if the product in question is held to be dutiable the appellant should be allowed to take the Modvat credit of the duty paid on the cold rolled steel strips.

Mr. Dhruv Mehta, learned counsel appearing on behalf of the respondent, on the other hand, would submit that by reason of amendment B carried out in Section 11A of the Central Excise Act by Act No. 10 of 2000, the basis of judgment in *Cotspun* has been removed inasmuch as the words "erroneously refunded" in the unamended Act had been supplemented by "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, C 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". According to the learned counsel, what was exclusively provided for by Rule 173B has now specifically been included in Section 11A of the Act.

D Mr. Mehta would urge that Section 11A, as it now stands, provides for reopening of approved classification lists and by reason of a show cause notice issued in terms thereof, the correctness of approval itself can be questioned and in that view of the matter the ratio of the judgment as laid down in paragraph 13 of the *Cotspun* (supra) has been removed.

E Relying heavily on *M/s. Easland Combines* (supra), the learned counsel would argue that the *Cotspun* (supra) could not have been rendered if the amended provisions of Section 11A of the Act had been in existence at the time of the said decision.

F As regard the question as to whether the processes undertaken by the appellant for obtaining the end product known as box strappings would amount to manufacture or not, the learned counsel would submit that the several stages of processes which are undertaken by the appellant is a clear pointer to the fact that the same amounts to manufacturing. The learned counsel would contend that this Court should not interfere with such a G finding of fact.

Reliance in this behalf has been placed on *Aditya Mills Ltd.* v. *Union of India,* [1988] 4 SCC 315.

On the question of classification, the learned counsel would submit that H the judgment and order of the Tribunal does not suffer from any misdirection

in law inasmuch as once it is held that the processes undertaken by the appellants lead to the manufacture of a distinct and identifiable product known in the marked as box strappings having regard to the fact that there is no substantial heading for box strappings and as such the product has rightly been classified as sub-heading 7308.90.

As regard the question of limitation and MODVAT, the learned counsel would submit that as the said question had not been raised before the Tribunal we should not permit the appellant to do the same before this Court for the first time.

VALIDATING STATUTE:

Relevant Statutory Provisions:

Rule 10 of the Central Excise Rules, 1944, as it stood, read as under:

"10. *Recovery of duties not levied or not paid or short-levied or not paid in full or erroneously refunded.—*

(1) When any duty has not been levied or paid or has been short-levied or erroneously refunded or any duty assessed has not been paid in full, the proper 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 to whom the refund has erroneously been made, or which has not been paid in full, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that:

(a) where any duty has not been levied or paid or has been short-levied or has not been paid in full by reason of fraud, collusion or any wilful mis-statement or suppression of facts by such person or his agent, or

(b) where any person or his agent, contravenes any of the provisions of these rules with intent to evade payment of duty and has not paid the duty in full, or

(c) where any duty has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by such person or his agent, the provisions of this sub-section

A shall, in any of the cases referred to above, have effect as if, for the words "six months", the words "five years" were substituted:

Explanation : Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the period of six months or five years, as the case may be.

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(2) The Assistant Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served under sub-rule (1), determine the amount of duty due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

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(3) For the purposes of this rule,-

(i) "refund", includes rebate referred to in rules 12 and 12A;

(ii) "relevant date" means,-

D (a) in the case of excisable goods on which duty of excise has not been levied or paid or on which duty has been short levied or has not been paid in full, the date on which the duty was required to be paid under these rules;

(b) in the case of excisable goods on which the value or the rate of duty has been provisionally determined under these rules, the E date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be;

(c) in the case of excisable goods on which duty has been erroneously refunded the date of such refund."

F Rules 173B and 173C of the Central Excise Rules read as under:

"173B ASSESSEE TO FILE LIST OF GOODS PRODUCED FOR APPROVAL OF THE PROPER OFFICER

(1) Every assessee, shall file with the proper officer for approval a list G in such form as the Collector may direct (in quintuplicate) showing,-

(a) the full description of -

(i) all excisable goods produced or manufactured by him,

(ii) all other goods produced or manufactured by him and intended to H be removed from his factory, and

(iii) all the excisable goods already deposited or likely to be deposited from time to time without payment of duty in his warehouse;

(b) the Chapter, heading No. and sub-heading No., if any, of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) under which each goods fall;

(c) the rate of duty leviable on each such goods; and

(d) such other particulars as the Collector may direct,

(2) The proper officer shall, after such inquiry as he deems fit, approve the list with such modifications as are considered necessary and return one copy of the approved list to the assessee who shall, unless otherwise directed by the proper officer, determine the duly payable on the goods intended to be removed in accordance with such list.

(2A)All clearances shall, subject to the provisions of rule 173 CC, be made only after the approval of the list by the proper officer. If the proper officer is of the opinion that on account of any inquiry to be made, in the matter or for any other reason to be recorded in writing, there is likely to be delay in according the approval, he shall, either on a written request made by the assessee or on his own accord, allow such assessee to avail himself of the procedure prescribed under rule 9B for provisional assessment of the goods.

(3) Where the assessee disputes the rate of duty approved by the proper officer in respect of any goods, he may, after giving an intimation to that effect to such officer, pay duty under protest at the rate approved by such officer.

(4) If in the list approved by the proper officer under sub-rule (2) any alteration becomes necessary because of-

(a) the assessee commencing production, manufacture or warehousing of goods not mentioned in that list, or

(b) the assessee intending to remove from his factory any non-excisable goods not mentioned in that list, or

(c) a change in the rate or rates of duty in respect of the goods mentioned in that list or, by reason of any amendment to the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) change in the Chapter, Heading No. and Sub-heading No.

A the assessee shall likewise file a fresh list or an amendment of the list already filed for the approval of such officer in the same manner as is provided in sub-rule (1)

(5) When the dispute about the rate of duty has been finalized or for any other reasons affecting rate or rates of duty a modification of the B rate or rates of duty is necessitated, the proper Officer shall make such modification and inform the assessee accordingly.

(6) The Collector may exempt by a general order any class of assesses who manufacture wholly goods which, for the time being, are exempt from paying duty, from filing the list under sub-rule (1):

C

Provided that as and when duty exemption is withdrawn or modified or no longer applicable, the assessee shall comply with the provisions of sub-rule (4) as if he had filed a list earlier and the list had been approved with 'nil' rate of duty.

D 173C ASSESSEE TO FILE PRICE-LIST OF GOODS ASSESSABLE AD VALOREM.

(1) Every assessee who produces, manufactures or warehouses goods which are chargeable with duty at a rate dependent on the value of the goods, shall file with the proper officer a price-list, in such form E and at such manner and in such intervals as the Collector may require, showing the price of each of such goods and the trade discount, if any, allowed in respect thereof to the buyers along with such other particulars as the Central Board of Excise and Customs or the Collector may specify.:

F (2) Prior approval by the proper officer of the price-list filed by an assessee under sub-rule (1) shall be necessary only, where the assessee-

(i) sells goods to or through related person as defined in section 4 of the Act; or

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(ii) uses such goods for manufacture or production of other goods in his factory; or

(iii) clears such goods for free distribution; or

(iv) clears such goods in any other manner which does not involve

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sale to a non-related person; or

(v) clears the goods of the same kind and quality from his factories located in the jurisdiction of different Collectors of Central Excise or Assistant Collectors of Central Excise or

(vi) submits a fresh price-list or an amendment of the price-list already filed with the proper officer and which has the effect of lowering the existing value of the goods.

*** ***

(5) Subject to the provisions of rule 173CC, an assessee specified in sub-rule (2) shall not clear any goods from a factory, warehouse or other approved place of storage unless the price-list has been approved by the proper officer. In case the proper officer is of the opinion that on account of any enquiry to be made in the matter or for any other reasons to be recorded in writing, there is likely to be delay in according approval, he shall either on a written request made by the assessee or of his own accord allow such assessee to avail himself of the procedure prescribed under rule 9B for provisional assessment of the goods."

Section 11A of the Central Excise Act, 1944 introduced from 15.11.1980 reads as follows:

"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 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

A such person or his agent, the provisions of this sub-section shall have effect as if, for the words Central Excise Officer the words "Collector of Central Excise and for the words "six months" the words "five years" were substituted :

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

Clause 97 of the Finance Act provided that in Sub-Section (1) of Section 11A of the Act following shall be added:—

C "(a) in the opening portion, for the words "erroneously refunded", the words "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
D goods under any other provisions of this Act or the rules made thereunder", shall be substituted and shall be deemed to have been substituted on and from the 17th day of November, 1980; (b) for the words "six months", wherever they occur, the words "one year" shall be substituted;

E (c) after the proviso and before the Explanation the following provisos shall be inserted, namely:-

"Provided further that where the amount of duty which has not been levied or paid or has been short- levied or short-paid or erroneously refunded is one crore rupees or less a notice under this sub-Section
F shall be served by the Commissioner of Central Excise or with his prior approval by any officer subordinate to him:

Provided also that where the amount of duty which has not been levied or paid or has been short-levied or short-paid or erroneously refunded is more than one crore rupees, no notice under this sub-
G section shall be served without the prior approval of the Chief Commissioner of Central Excise".

Section 11A after amendment by Section 110 of the Finance Act, 2000 reads as under:

H "11A. Recovery of duties not levied or not paid or short-levied or

short-paid or erroneously refunded.— A

(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or 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 B 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 C 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 D of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with an 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 :

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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."

COTSPUN:

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In *Cotspun* (supra) classification lists were filed in terms of Rule 173 B of the Central Excise Rules and the same had been approved by Revenue. The approval classified the NES yard under old Tariff Item 19-I(2)(a)(2)(e). A notice to reopen the assessment was issued on 28th September, 1977 in respect of the period February, 1977 to May, 1977 inter alia on the ground that the NES yarn ought to have been correctly classified under old Tariff Item 19- G I(2)(F). Another notice was issued for a subsequent period. The contention of the assessee was that the approved classification list could not be reopened and, therefore, the demand for differential duty could not be enforced. The Assistant Collector upheld the assessee's contention whereas the Appellate Collector reversed the same. The Tribunal held that the revised assessment H

A could be made effective only prospectively from the date of the show cause notices and not with reference to earlier removals made under approved classification lists. An appeal was filed thereagainst by the Revenue. This Court noticed that in terms of Rule 173B which deals with self-removal procedure, an assessee is required to file before the proper Excise officer or
B approval a list of the goods that he proposes to clear containing a description of the goods produced or manufactured by him, the goods that he intends to remove and all excisable goods already deposited or likely to be deposited without payment of duty in his ware house and to indicate the tariff entry under which he intends to fall, rate of duty leviable thereon and such other particulars as may be required. In terms of Sub-rule (2) of Rule 173B the
C proper officer was required to determine the duty payable on the goods upon making an enquiry in that regard. Provision for a dispute as to the approved rate of duty was made in Clause (3). Sub-rule (5) of Rule 173B reads as under:

> "(5) When the dispute about the rate of duty has been finalized or for any other reasons affecting rate or rates of duty a modification of the
D rate or rates of duty is necessitated, the proper Officer shall make such modification and inform the assessee accordingly."

In *Rainbow Industries* (supra), it was held:

> "Once the Department accepted the price list, acted upon it and the
E goods were cleared with the knowledge of the Department, then, in absence of any amendment in law or judicial pronouncement, the reclassification should be effective from the date the Department issued the show cause notice. The reason for it is clearance with the knowledge of the Department and no intention to evade payment of
F duty."

The reason for arriving at the aforementioned conclusion, thus, was that clearance had been made with the knowledge of the Department and there had been no intention to evade payment of duty.

G However, in *Ballarpur Industries* (supra), this Court had held that reclassification would operate retrospectively. In *Ballarpur Industries* (supra), *Rainbow Industries* (supra) was distinguished stating that the observations made therein were confined to the facts of that case. Placing reliance on Rule 10 which was in *pari materia* with unamended Section 11A, it was observed:

H "The Bench placed reliance upon Rule 10 and held that, on a plain

reading of that provision as also of Section 11-A, the show-cause notice which could be issued within the time-limit prescribed under the relevant provision could only be in relation to the duty of excise for a period prior to the issuance of show-cause notice. There could be no reason for the issuance of a show-cause notice for the period subsequent to the notice as in that case the necessary corrective action could always be taken. But Rule 10 with which we are concerned as well as Section 11-A to which a reference is made in the case of *Rainbow Industries* [1994] 6 SCC 563, the show-cause notice which must be issued within the time frame prescribed in the said provisions must relate to a period prior thereto as the purpose of the show-cause notice is recovery of duties or charges short-levied, etc. We, therefore, find it difficult to accept the contention that the ratio of the decision in *Rainbow Industries,* [1994] 6 SCC 563 is that under Section 11-A past dues cannot be demanded. We must, therefore, reject that contention".

The controversy, thus, revolved round the question as to whether until the proposal for modification of the classification was mooted, the earlier classification would operate or as to whether duty in accordance with law also could be demanded.

The Constitution Bench analyzing the provisions of Rule 10 and Rule 173B observed:

> 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.
>
> 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.

VALIDATION ACT:

Section 11A as amended by Finance Act, 2000 brings about absolutely a different situation.

Statement of Objects and Reasons for amending Section 11A reads, thus:

A "Clause 106 seeks to validate certain action taken under Section 11A of the Central Excise Act with retrospective effect from 17th November, 1980, so as to prescribe that the notices issued under the said section for non-recovery or short-recovery or erroneous refund of duties for a period of six months or five years in certain situations will prevail notwithstanding any approval, acceptance or assessment of duty under the provisions of the Central Excise Rules. The clause also seeks to validate actions taken in the past on this basis in conformity with the legislative intention. This amendment has become necessary to overcome certain judicial pronouncements."

C Further, Clause 110 of the Finance Act validating actions taken under Section 11A provides as under:—

"110.(1) Any notice issued or served on any person under the provisions of Section 11A of the Central Excise Act during the period commencing on and from the 17th day of November, 1980 and ending on the date on which the Finance Act, 2000 receives the assent of the President (hereinafter referred to as the said period) demanding duty on account of non-payment, short payment, non-levy, short-levy or erroneous refund within a period of six months or five years, as the case may be, from the relevant date as defined in Clause (ii) of Sub-section (3) of that section shall be deemed to be and to always have been, for all purposes, validly and effectively issued or served under that section, notwithstanding any approval, acceptance or assessment relating to the rate of duty on or value of, the excisable goods by any Central Excise Officer under any other provision of the Central Excise Act or the rules made thereunder.

(2) Any action taken or anything done or purporting to have been taken or done under Section 11A of the Central Excise Act at any time during the said period shall be deemed to be and to have always been, for all purposes, as validly and effectively taken or done as if Sub-section (1) had been in force at all material times and, accordingly, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority,-

(a) all duties of excise levied, assessed or collected during the period specified in Sub-section (1) on any excisable goods under the Central Excise Act, shall be deemed to be and shall be deemed to always have been, as validly levied, assessed or

collected as if Sub-section (1) had been in force at all material times; A

(b) no suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for the refund of, and no enforcement shall be made by any court of any decree or order directing the refund of any such duties of excise which B have been collected and which would have been validly collected if Sub-section (1) had been in force at all material times;

(c) recovery shall be made of all such duties of excise which have not been collected or, as the case may be, which have been refunded but which would have been collected or, as the case C may be, would not have been refunded, if Sub-section (1) had been in force at all material times.

Explanation.—"For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section D had not come into force."

THE LAW OPERATING IN THE FIELD:

A validation Act removes actual or possible voidness, disability or other defect by confirming the validity of anything which is or may be invalid. E

In *Shri Prithvi Cotton Mills Ltd. and Anr.* v. *Broach Borough Municipality and Ors.*, [1969] 2 SCC 283, it was pointed out that a legislature does possess the power to validate statutes and to pass retrospective laws. The Court, however, laid down:

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"When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and G illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so H

A fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact B removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the C Legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the D competence of the legislature and legal and adequate to attain the object of validation. If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends E upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax."

F In *M/s. Ujagar Prints and Others (II)* v. *Union of India and Ors.*, [1989] 3 SCC 488 wherein after considering various decisions, this Court held thus:

"A competent legislature can always validate a law which has been declared by courts to be invalid, provided the infirmities and vitiating infactors noticed in the declaratory judgment are removed or cured. G Such a validating law can also be made retrospective. If in the light of such validating and curative exercise made by the legislature - granting legislative competence - the earlier judgment becomes irrelevant and unenforceable, that cannot be called an impermissible legislative overruling of the judicial decision. All that the legislature H does is to usher in a valid law with retrospective effect in the light

of which earlier judgment becomes irrelevant. (See *Shri Prithvi Cotton Mills Ltd. Broach Borough Municipality,* [1969] 2 SCC 283 : [1970] 1 SCR 388 [1971] 79 ITR 136). A

66. Such legislative experience of validation of laws is of particular significance and utility and is quite often applied, in taxing statues. It is necessary that the legislature should be able to cure defects in B statues. No individual can acquire a vested right from a defect in a statute and seek a windfall from the legislature's mistakes. Validity of legislations retroactively curing defects in taxing statues is well recognised and courts, except under extraordinary circumstances, would be reluctant to override the legislative judgment as to the need for and C the wisdom of the retrospective legislation. In *Empire Industries Ltd.* v. *Union of India,* [1985] 3 SCC 314 : [1985] SCC (Tax) 416 : [1985] Supp. 1 SCR 292), this Court observed :

.... not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the D nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government amongst those who benefit from it.

In testing whether a retrospective imposition of a tax operates so harshly as to violate fundamental rights under Article 19(1)(g), the E factors considered relevant include the context in which retroactivity was contemplated such as whether the law is one of validation of a taxing statute struck down by courts for certain defects; the period of such retroactivity, and the degree and extent of any unforeseen or unforeseeable financial burden imposed for the past period etc. Having regard to all the circumstances of the present case, this Court in F *Empire Industries* case [1985] 3 SCC 314 : [1985] SCC (Tax) 416 : 1985 Supp 1 SCR 292) held that the retroactivity of the amending provisions was not such as to incur any infirmity under Article 19(1)(g)."

In *Delhi Cloth & General Mills Co. Ltd. and Anr.* v. *State of Rajasthan and Ors.,* [1996] 2 SCC 449 a question arose as to whether a village which G was not held to have been included within the limits of a town municipality as mandatory provisions in that part had not been followed could be so included with retrospective effect by a Validating Act by seeking to set at naught a full Bench decision of the Rajasthan High Court. Referring to *Prithvi Cotton Mills* (supra) it was held: H

A "15. In the case of the village of Raipura there was a preliminary notification calling for objections to the extension of the limits of the Kota Municipality to include it, but it was not followed by a final notification. In the case of the village of Ummedganj there was a notification extending the limits of the Kota Municipality to include it, but it had not been preceded by a notification inviting the objections B of the public thereto. Later, another notification was published whereby the village of Ummedganj was excluded from the limits of the Kota Municipality. The provisions of Sections 4 to 7 of the 1959 Act and the earlier provisions of the 1951 Act in the same behalf were, therefore, not met in the case of either the village of Raipura or the village of C Ummedganj. The Full Bench of the Rajasthan High Court has held that these provisions were mandatory and that judgment has become final.

16. The Validating Act provides that, notwithstanding anything contained in Sections 4 to 7 of 1959 Act or in any judgment, decree, order or direction of any court, the villages of Raipura and Ummedganj D should be deemed always to have continued to exist and they continue to exist within the limits of the Kota Municipality, to all intents and for all purposes. This provision requires the deeming of the legal position that the villages of Raipura and Ummedganj fall within the limits of the Kota Municipality, not the deeming of facts from which this legal consequence would flow. A legal consequence cannot be E deemed nor, therefrom, can the events that should have preceded it. Facts may be deemed and, therefrom, the legal consequences that follow."

As Sections 4 to 7 of Rajasthan Municipalities Act, 1959 remained F unamended which were mandatory, the defect was held to have not been cured.

Yet again in *K. Shankaran Nair (Dead) through LRs.* v. *Devaki Amma Malathy Amma and Ors.*, [1996] 11 SCC 428 this Court followed the aforementioned as well as and other decisions of this Court. It was observed:

G "It becomes at once clear that once this Court struck down the rule concerned permitting compulsory retirement of a government servant the very basis of the earlier judgment upholding such an exercise got knocked off and was totally obliterated from the Statute-Book. Consequently the very foundation of the judgment vanished. Such a H judgment would obviously become baseless lacking the very foundation

on which it could operate. The very foundation of an earlier judgment can be displaced by either a competent legislature enacting a retrospective provision for that purpose or by a competent court deciding the legal provision concerned on which such judgment is based as *ultra vires* and void. In either case the very foundation and legal substitution of such judgment will vanish retrospectively. In such an eventuality the law could be said to have been totally displaced from the very inception of enactment of such a law and consequently any judgment based on such a non-existing law as found in retrospect could obviously lack efficacy and consequential force of *res judicata*."

In *Bakhtawar Trust and Ors.* v. *M.D. Narayan and Ors.*, [2003] 5 SCC 298], one of us (Khare, CJI) speaking for the Bench upon noticing some of the decisions referred to hereinbefore and other decisions observed that the questions which were required to be posed and answered are:

(i) what was the basis of the earlier decision; and

(ii) what, if any, may be said to be removal of that basis?

Upon considering the relevant provisions therein it was held that the basis of the decision of the High Court had undergone a change having regard to the change in the Zonal Planning Regulations which now changed the law, which the High Court was bound to take the view in terms of the changed law. This Court held:

"It is well settled by the decisions of this Court that when a validity of a particular statute is brought into question, a limited reference, but not reliance, may be made to the Statement of Objects and Reasons. The Statement of Objects and Reasons may, therefore, be employed for the purposes of comprehending the factual background, the prior state of legal affairs, the surrounding circumstances in respect of the statute and the evil which the statute has sought to remedy. It is manifest that the Statement of Objects and Reasons cannot, therefore, be the exclusive footing upon which a statute is made a nullity through the decision of a Court of law."

In *Easland Combines* (supra), this Court held:

"In our view, there is no substance in this submission. As stated earlier, the relevant amended portion of Section 11A *inter alia* makes it abundantly clear that when any duty of excise has been short levied

A or short paid, whether or not such short levy or short payment 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 the Act or the rules, the Central Excise Officer, can within one year from the relevant date, serve notice on the person chargeable with the duty, which has been short levied or short paid, requiring him to show cause why he should not pay the amount specified in the notice. This amendment changes the entire basis or foundation of the judgment rendered in *Cotspun's* case (supra). The entire discussion in the said case is based upon rule 173B which dealt with classification list and that assessee must determine the excise duty which is payable by him on the goods which he intends to remove in accordance with approved classification list. The Court based its reasoning by holding "Rule 10 does not deal with classification list or relate to reopening of approved classification lists. That is exclusively provided by Rule 173B." The Court further held that the levy of excise duty on the basis of approved classification list is not short levy and the differential duty cannot be recovered on the ground that it is a short levy and Rule 10 then has no application. After the amendment of law, this reasoning of the judgment would no longer survive. It is true that the levy of excise duty on the basis of approved classification list or price-list or the assessment order is correct levy till such time as the correctness of the approved classification list or price list or till the assessment order is set aside. However, with retrospective effect, the legislature has empowered the Central Excise Officer to set at naught the erroneous approval of classification list or acceptance of price list or assessment order. What was provided by Rule 173B is now specifically provided by Section 11A."

We may notice that in *Widia (India) Ltd. and Ors.* v. *State of Karnataka and Ors.*, [2003] 8 SCC 22, this Court held:

"It is true that normally tax would not be levied with retrospective effect but at the same time to validate the tax which was levied, after removing the defects pointed out by the previous decision, the State Government could exercise its powers under Section 3(1) of the Act and it cannot be said that it has acted beyond its jurisdiction. Therefore, it cannot be held that notification dated 23rd September, 1998 empowering the authority to levy and collect tax w.e.f. 1.4.1994 to

6.1.1998 is, in any way, illegal or erroneous. The defects pointed out in *Avinyl Polymers's* case (supra) are removed and, therefore, it cannot be said that the notification dated 23.9.1998 is, in any way, illegal. In a situation like the present one where notifications levying tax were held to be illegal, for validating such levy, the State Government has issued the aforesaid notification. It is not pointed out that the said notification is discriminatory between the goods imported from other States and similarly goods manufactured or produced within the State." A B

APPLICATION OF THE LAW:

The Statements of Objects and Reasons for enacting a statute can be read for a limited purpose. In *Cotspun* (supra) this Court held that Rule 10 does not deal with classification list or relate to reopening of the approved classification list. According to the Constitution Bench, the same is exclusively provided by Rule 173B. C

Section 11A deals with a case when *inter alia* excise duty has been levied or has been short-levied or short-paid. The word "such" occurring after the words "whether or not" refers to non-levy, non-payment, short-levy or short-payment or erroneous refund. It is, therefore, not correct to contend that the word "such" indicates only such short-levy which has been held to be non-existent in *Cotspun* having regard to Rule 173B. Such short-levy or non-levy may be on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods. Thus, any approval made in terms of Rule 10, in the event, any mistake therein is detected, would also come within the purview of the expression "such short-levy or short-payment". Such notice is to be served on the person chargeable with the duty which *inter alia* has been short-levy or short-paid. D E F

It is true that Rule 173B has not been amended. But even if the same has not been done, it would not make a material difference as now a comprehensive provision has been made in the primary Act, and, thus, a rule framed thereunder even in case of conflict must give way to the substantive statute. It is a well-settled principle of law that in case of a conflict between a substantive act and delegated legislation, the former shall prevail inasmuch as delegated legislation must be read in the context of the primary/ legislative act and not the *vice-versa*. G

The procedure laid down under Rule 173B of the Rules has specifically been included in the Act. Furthermore, by reason of the amended Act a H

A provision has been made for reopening the approved classification lists. It is a procedural provision in terms whereof statutory authorities are required to determine as to whether the earlier classification was correctly done or not. The said authority upon giving an opportunity of hearing the parties may come to the conclusion that decision on the approval granted need not be reopened and even if the same is reopened, the reasons therefor are to be B stated. As the provision of Section 11A is a recovery provision as regards non-levy or non-paid or short-levy or short-paid or erroneously refunded duties by reason of the said amendment the Parliament had merely provided that an approval on the basis of a classification list *inter alia* in case of a short-levy can be recovered if a finding is arrived at that the goods had C undergone a short-levy. For the aforementioned purpose, Clause 110 of the Finance Act, validating actions taken under Section 11A can be taken into consideration whereby and whereunder a legal fiction is created.

The effect of creating such legal fiction is well-known and need not be reiterated. [See *Bhavnagar University* v. *Palitana Sugar Mill Pvt. Ltd. and* D *Ors.*, [2003] 2 SCC 111, *State of Karnataka* v. *Vishwabharathi House Building, Coop. Soc. and Ors.*, [2003] 2 SCC 412, *High Court of Judicature for Rajasthan* v. *P.P. Singh and Anr.*, [2003] 4 SCC 239 and *Dipak Chandra Ruhidas* v. *Chandan Kumar Sarkar*, [2003] 7 SCC 66).

E Before us, the constitutionality of Section 11A as amended in the year 2000 has not been questioned.

Cotspun (supra) was decided when the matters relating to classification, approval thereof as also short-levy or upon detection of a mistake were governed by the rules. Rule 10 and Rule 173 B were to be read in conjunction F with each other and the Constitution Bench merely followed the said principle of interpretation of statute. A different situation has arisen now having regard to the fact that not only the substantive provision dealing with the consequence of non-levy, non-payment or short levy or short-payment or erroneous refund but also has laid down the procedure therefor.

G A statute, it is trite, must be read as a whole. The plenary power of legislation of the Parliament or the State Legislature in relation to the legislative fields specified under Seventh Schedule of the Constitution of India is not disputed. A statutory act may be enacted prospectively or retrospectively. A retrospective effect indisputably can be given in case of curative and validating statute. In fact curative statutes by their very nature are intended to operate H upon and affect past transaction having regard to the fact that they operate

on conditions already existing. However, the scope of the validating act may vary from case to case. A

For the reasons aforementioned, we are of the opinion that the Section 11A of the Act as amended is a valid piece of legislation.

LIMITATION: B

Having answered the reference, we are of the opinion that this Court in the peculiar facts and circumstances of this case at this stage need not go into the question as to whether the processes undertaken by the appellant would amount to manufacture or whether the classification of goods under sub-heading 7308.90 is correct, in view of the fact that the question as regard limitation and availability of MODVAT had not been considered. C

It is not in dispute that in terms of Section 11A a show cause notice for short-levy could have been issued only within six months from the relevant date. Only in the event, such short-levy was imposed on account of fraud, collusion, willful mis-statement or suppression of facts with an intent to evade payment of duty on the part of the manufacturer, the extended period of limitation of five years could be invoked. D

The appellant herein in paragraph 15 of reply dated 2nd June, 1987 categorically stated that such classification has been made to the knowledge of the Department. It was contended: E

> "On the contrary all the processes were carried out openly and they itself had come up for detailed consideration and eventually the decision was taken under Assistant Collector's order dated 14.7.83 after due application of mind and it would, therefore, be incredible to allege as is sought to be done that the department was not in a position to get first-hand knowledge of the various processes adopted." F

The appellant further had contended:

> "We deny each and every allegation contained in the show cause notice. We submit that from the legal point of view the classification cannot be changed as proposed in the show cause notice, nor does the factual position warrant modification of the classification. When Heading/Sub-heading 7211.31 is specific (cold rolled strips), the goods cannot be consigned to 7308.90 which is not specific and is a residuary G H

A item. As long as the subject goods were not classifiable under T.I 68 when it existed, they cannot attract the corresponding sub-heading 7308.90. We also submit that Rule 9(2) cited in the show cause notice is not applicable since there was no clandestine clearances."

It is, therefore, evident that the contention of the appellant was that B Rule 9(2) cited in the show cause notice was not applicable. But, unfortunately, despite the same it had not been adverted to by the tribunal. We must notice that the appellant herein succeeded before the Appellate Collector. The Revenue went up in appeal. The Tribunal was, therefore, bound to take the aforementioned question into consideration inasmuch a finding of fact was C required to be arrived at that the period of limitation for issuing such notices under Section 11A of the Act would depend upon the question as to whether such short-levy was due to any act of fraud, collusion, willful, mis-statement or suppression of facts, the extended period of limitation of five years could not have been invoked.

D Such an extended period of limitation can be invoked only on a positive act of fraud etc. on the part of assessee is found. Such a positive act must be in contradistinction to mere inaction like non-taking of licence etc. It has to be pleaded and established. [See *Padmini Products* (supra), *P&B Pharmaceuticals Ltd.* (supra) and *Pushpam Pharmaceuticals Ltd.*, (supra)]

E Even in *Easland Combines* (supra) this Court held:

"It is settled law that for invoking the extended period of limitation duty should not have been paid, short levied or short paid or erroneously refunded because of either fraud, collusion, wilful misstatement, suppression of fact or contravention of any provision F or rules. This Court has held that these ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or willful misstatement or suppression of fact or contravention of any provision is not sufficient to attract the extended period of limitation."

G The question of limitation involves a question of jurisdiction. The findings of fact on the question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question is to be determined having regard to both fact and law involved therein. The Tribunal, in our opinion, committed a manifest error in not determining the said question, particularly, when in the absence H of any finding of fact that such short-levy of excise duty related to any

positive act on the part of the appellant by way of fraud, collusion, willful mis- A
statement or suppression of facts, the extended period of limitation could not have been invoked and in that view of the matter no show cause notice in terms of Rule 10 could have been issued.

Furthermore, even if the short-levy, if any, is to be recovered, the appellant was entitled to raise a question that he is entitled to adjust the duty B
upon taking MODVAT credit of the duty paid on cold rolled steel strips. These aspects of the matter, in our opinion, required to be gone into by the Tribunal.

CONCLUSION:

C

For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside and the matter is remitted to the Tribunal for consideration thereof afresh in accordance with law and in the light of the observations made herein. This appeal is allowed in part but without any order as to costs.

D

S.K.S. Appeal partly allowed.