A SARABHAI M. CHEMICALS

*v.*

COMMISSIONER OF CENTRAL EXCISE, VADODARA

DECEMBER 16, 2004

B [S.N. VARIAVA, DR. AR. LAKSHMANAN AND S.H. KAPADIA, JJ.]

*Central Excise Act, 1944—Section 11A(1)—Central Excise Rules, 1944—Rule 9(2)—Excise Duty—Exemption from—Of bulk drug—By Notification—Product certified as bulk drug by Drugs Controller—Exemption granted—Classification List and monthly returns filed by manufacturer approved by the Revenue—Demand of Duty by Revenue at belated stage denying exemption on the ground that certain amount of the goods were sold to the non-pharma concerns—Appeal to Tribunal—Difference of opinion on the point to limitation between Judicial Member and Technical Member—Matter referred to Third Member—Matter dismissed on the point of limitation as well as merit—On appeal, held : Third Member rightly decided the question of limitation as well as merit—Demand rightly raised by Revenue as manufacturer last the benefit of exemption Notification because certain quantity of the goods was admittedly diverted to non-pharma concern—However the demand was time barred—No case was made out for invoking proviso to Section 11A(1) for extended period of limitation—Drugs (Price Control) Order, 1979—Section 2(a).*

**Appellant was manufacturer of bulk drugs. It used to manufacture Ascorbic Acid and Salts of I.P. (Vitamin 'C') as well as sorbitol Solution U.S.P. By a Notification, the bulk drugs as defined in the Notification were exempted from levy of excise duty. Appellant claimed exemption in respect of its products. It obtained certificates from Drugs Controller in respect of the claim. In the Classification List exemption was sought on the basis of the certificates. The Classification Lists were approved by the Department. Appellant cleared the goods upon submission of the gate passes wherein they had disclosed the names of the consignees. Appellant also submitted its monthly returns on excisable goods manufactured by it in the prescribed RT.12 Forms, giving the particulars of the goods removed, gate passes under which the goods were removed etc.**

Three show-cause notices were issued to the appellants after a period of one year on the ground that appellant had wrongly availed nil rate of duty in respect of its clearances by not bringing to the notice of the department the fact that certain qualities of sorbitol solution and Vitamin 'C' had been sold to non-pharma concerns. Knowing fully well that the commodities would not be normally used as drugs or medicines by its customers and demanded excise duty u/s. 11A(1) of Central Excise Act, 1944. The demand was confirmed by the Department.

In appeal before Custom, Excise, Gold (Control) Appellate Tribunal, Judicial Member was of the view that as the show cause notices were time barred and no case was made out for invoking extended period of limitation and hence set aside the show cause notices. Technical Member disagreed with the Judicial Member. In view of difference of opinion, the matter was referred to the Third Member to decide whether the demand was time barred. He agreed with the Technical Member and accordingly dismissed the appeals.

In appeal to this Court appellant contended that the Third Member after concurring with the Technical Member on the question of limitation should have referred the matter back to Division Bench to decide on merits, and dismissal of appeal without going into the merits was erroneous; that since the Drugs Controller had issued the certificate in favour of the appellant certifying the product as a bulk drug, its product met the requirement laid down in the exemption Notification and no further requirement remained to be complied with; that the word 'Normally' used in the Notification means "under normal circumstances" and the same would rule out individual end use of the product; that the Notification did not require production of end use certificate by the assessee and in absence of such provision Department was not entitled to insist on production of end use certificate; that it was not open to the Department to raise the dispute at belated stage by invoking Rule 9(2) of Central Excise Rules; that the appellant had filed Classification List and monthly Returns in RT-12 Forms from time to time which were duly approved and the goods were cleared after approval of the Department; and that the appellant *bonafide* believed that the goods were covered by the exemption Notification.

Allowing the appeals, the Court

A **HELD : 1. Appellants had conceded before the Tribunal of having cleared 3.87% of the total clearances to non-pharmaceutical companies who could not have used the said solution as drugs or medicines. Moreover, the department has not demanded the duty in respect of quantity sold to pharmaceutical concerns for pharmaceuticals or medical pur-**
B **poses. In the circumstances, the Third Member was right in holding that the appellant had failed to comply with the statutory requirement of the exemption Notification. [1023-F-G; 1024-A]**

**2.1. The bulk drug is defined under Section 2(a) of the Drugs (Prices Control) Order, 1979 to mean any substance including pharma-**
C **ceutical, chemical biological or plant product which is used as such or an ingredient in any formulation. A substance may have several uses other than in drugs/pharmaceuticals. The eligibility for exemption under the exemption Notification requires the substance (sorbitol solution) to be actually used in manufacture of drugs/medicines/pharmaceuticals. A**
D **sorbitol solution could be called a drug for the purposes of exemption only when it is actually used as drug or as an ingredient in any formulation. The Notification gave exemption to only those substances, which are, in reality, drugs and not to the substances, which are not drugs even though they are capable of acting as drugs. Therefore, the exemption was extendable to sorbitol solution, cleared by the appellant, when used**
E **in the manufacture of drugs, medicines, pharmaceuticals. By diverting a specified quantity of sorbitol solution etc., the appellant lost the benefit of exemption and in the circumstances, the department was right in raising the demand. [1025-G-H; 1026-A-B-C-D]**

F **2.2. In the explanation to the Notification, there are two expressions, namely *"normally used"* and *"used as such"*. Both these expressions have to be read in *juxta positions*. If so read, it becomes clear that the expression "used as such" in the proviso qualifies the actual use and not the capability of use. These words are by way of emphasis. They are a condition to be actually satisfied before the exemption can be availed**
G **and granted. Consequently, every manufacturer of a bulk drug cannot seek the benefit of exemption under the said Notification merely by reason of "normal use" of the drug. The words "normal use" indicate the possible use whereas the expression "used as such" indicates the actual use. The certificates issued by the Drugs Controller shows that**
H **they did not deal with uses other than "normal uses" of such bulk drugs.**

**In the circumstances, the Tribunal was right in holding that the benefit of the exemption was available only to those drugs which went into the stream of diagnosis, treatment etc. and not to the use of any other profit making activity. [1026-G-H; 1027-A]**

**3.1. Reopening of approvals/assessments is different from raising of demand in relation to the extended period of limitation. Under Section 11A(1) of the Central Excise Act, 1944, a proper officer can reopen the approvals/assessments in cases of escapement of duty on account of non-levy, non-payment, short-levy, short-payment or erroneous refund, subject to it being done within one year from the relevant date. On the other hand, the demand for duty in relation to extended period is mentioned in the proviso to Section 11A(1). Under that proviso, in cases where excise duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded on account of fraud, collusion or willful mis-statement or suppression of facts, or in contravention of any provision of the Act or Rules with intent to evade payment of duty, demand can be made within five years from the relevant date. In the present case, the Court is concerned with the proviso to Section 11A(1). [1027-D-E-F]**

**3.2. There was no willful suppression of facts on the part of the appellant as the appellant had filed the Gate Passes, Invoices and monthly returns, indicated the names of the consignees from which it was possible for the Department to infer sale of sorbitol solution to non-pharmaceuticals companies and yet no steps were taken by the department to raise the demand in time and, therefore, there was no willful suppression of material facts for invoking the proviso to Section 11A(1). In the present case, the demands raised by the department in the impugned three show-cause notices were time barred. The material placed on record shows filing of Gate Passes, Invoices, Classification List. They indicated the names of the consignees. A mere reading of these names would indicate that Sorbitol Solution was sold to non-pharmaceutical companies. Despite such disclosure, the department approved the Classification List as well as RT-12 returns. There was no reopening of the approvals and assessments within the stipulated period. In the circumstances, the Judicial Member of the Tribunal was *right in holding* that no case was made out for invoking the extended period of limitation. The end use was built in the exemption Notification. Therefore, the Depart-**

**ment could have demanded duty within one year from the relevant date under section 11A(1). However, this was not done. In the absence of evidence of suppression of facts, the Judicial Member was right in setting aside the show-cause notices. [1029-D-E; 1028-E-F]**

**3.3. Although on merits the Department succeeds, these appeals need to be allowed as the impugned show-cause notices-cum-demands were time barred and as no case is made out by the Department for invocation of the proviso to Section 11A(1) of the Act. [1029-F]**

*Cosmic Dye Chemical* **v.** *Collector of Central Excise, Bombay,* **(1995) 75 ELT 721 and** *Pushpam Pharmaceuticals Company* **v.** *Collector of Central Excise, Bombay,* **(1995) 78 ELT 401, relied on.**

*Jayant Vitamins Limited* **v.** *Union of India,* **(1991) 53 ELT 278, distinguished.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2736-2738 of 1999.

From the Judgment and Order dated 11.1.98 of the Central Excise Customs and Gold (Control) Appellate Tribunal, New Delhi in F.O. Nos. 41-43/99-C in A. Nos. E/736/91-C, E/738/91-C and E/747 of 1991-C.

Ravindra Narain, Ms. Sonu Bhatnagar, Ajay Aggarwal and Rajan Narain for the Appellant.

R. Venkataramani V. Ramasubramanian, P. Parmeshwaran and B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

**KAPADIA, J. :** These appeals under section 35L(b) of Central Excise Act, 1944 are directed against a majority decision dated 11.1.1999 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, by which common order, the Appeal Nos.E-736/91-C, E-738/91-C and E/747/91-C filed by the appellant were dismissed.

The facts, briefly, stated are as follows:

M/s Sarabhai M. Chemicals, the appellant herein, is a manufacturer of bulk drugs in India. It manufactures Ascorbic Acid and Salts of I.P. (Vitamin 'C') as well as Sorbitol Solution U.S.P. The said goods fall under chapter heading 29 of Central Excise Tariff Act, 1985.

By notification no. 234/86 dated 3.4.1986, the Central Government exempted the bulk drugs as defined in the said notification from payment of excise duty. The appellant submitted its classification list for approval claiming exemption under the said notification. By letter dated 17.4.1986, the Assistant Collector permitted the appellant to clear the bulk drugs under the above notification subject to production of a certificate from the Drugs Controller, Government of India. The appellant obtained certificates from the Drugs Controller dated 17.4.1986, 15.5.1986, 21.5.1986 and 6.8.1990, in respect of their claim for exemption under the aforestated notification. In the classification list, exemption was sought by the appellant under notification no. 234/86 on the basis of certificates received by the appellant from the Drugs Controller, Government of India. The classification lists were scrutinized, verified and approved by the Assistant Collector. The appellant cleared the goods upon submission of the gate passes in which they disclosed the names of the consignees. The appellant also submitted its monthly returns on excisable goods manufactured by it in the prescribed RT-12 forms, which gave the particulars of the goods removed, gate passes under which the goods were removed etc.

Three show-cause notices were received by the appellant on 30.12.1987, 6.4.1988 and 20.6.1988 from Collector of Central Excise, Vadodara, denying the exemption under notification no. 234/86. All the three show-cause notices alleged that the appellant has wrongly availed nil rate of duty in respect of its clearances by not bringing to the notice of the department the fact that certain quantities of sorbitol solution and vitamin "C" had been sold to non-pharma concerns knowing fully well that the commodities would not be normally used as drugs or medicines by its customers. By the said show-cause notices, the appellant was asked to show-cause *inter alia* as to why excise duty should not be recovered under section 11-A(1) of the said Act read with rule 9(2) of the Central Excise Rules, 1944. The said three show-cause notices related to the period, April 1986 to November 1986, March 1984 to February 1986, and April 1986 to 30th April, 1987. The grounds for demand stated that on verification of the records of the appellant, it was noticed by the department that the appellant had cleared sorbitol solution

A to cigarette manufacturers, which fact was not brought to the notice of the department at the time of clearance.

By its reply dated 2.3.1988, 18.7.1988 and 6.10.1988 respectively, the appellant submitted that the Drugs Controller to the Government of India
B had issued a certificate certifying sorbitol solution etc. as a Bulk Drug after scrutinizing and examining the product; that the sorbitol solution manufactured by the appellant met the requirement of the said notification; and that the word "normally" used in the notification did not restrict the exemption based on individual end use. It was urged that if the intention was to restrict use of sorbitol solution by drug manufacturing units only for diagnosis,
C treatment, medication or in prevention of diseases or as an ingredient in any formulation then the Legislature would have used the word "exclusively" instead of the word "normally"; that the notification did not require the appellant to ascertain the end use at the time of clearance of a bulk drug from the factory and that once the certificate from the Drugs Controller was
D issued in terms of the notification no. 234/86, no further requirement remained to be complied with in the matter of availing exemption under the notification. It was argued that the proviso to the notification did not leave any scope for further enquiry regarding the end use of the product on the part of the proper officer to grant exemption to the product which was certified as 'bulk drug' by the Drugs Controller. It was submitted that the
E Government did not intend to put the burden of production of end use certificate on the appellant; that had the Government intended to do so, some such provision would have been made in the notification. It was further submitted that the certificate granted by the Drugs Controller was final for all clearances of bulk drugs for exemption. It was submitted that the demand
F of duty by the department on sorbitol solution was without jurisdiction and without any authority of law; that it was based on misinterpretation of the word "normally" used in the notification and consequently, the demand notice was bad-in-law and a nullity. It was submitted that a conjoint reading of the proviso and the explanation given in the notification indicated that when the Drugs Controller issues a certificate under the notification to the
G effect that the goods in question were bulk drugs as given in the explanation, the goods were entitled to exemption. On the point of limitation, it was submitted that the appellant had filed their classification list to which the department had never objected. It had filed RT-12 assessments and the same were approved by the department from time to time. The appellant *bonafide*
H believed that the goods in question fell under the said notification. The

appellant was allowed to clear the goods by the department and consequently, invocation of rule 9(2) of the Central Excise Rules by the department was not warranted, as there was no violation of rule 9(1). It was argued that the normal trade pattern of putting sorbitol solution in the market was through distributors and consequently it was impossible to get an end use certificate at the time of clearance of the consignments at the factory gate.

By orders dated 23.11.1990, 22.11.1990 and 23.11.1990, the Collector rejected the contentions of the appellant and confirmed the demands in all the three notices.

Being aggrieved by the three orders passed by the Collector, the appellant filed three separate appeals, referred to above, before the Customs, Excise Gold (Control) Appellate Tribunal, New Delhi (hereinafter referred to as "the Tribunal"). The appellant argued the matter before the Tribunal on the point of limitation as well as on merits. The Judicial Member (J.M.) took the view that the above show-cause notices were time barred and no case was made out for invoking the extended period of limitation as the demands mentioned in the three show-cause notices have been worked out from the gate passes without further investigation by the department with the consignees mentioned in the gate passes. According to the J.M., the matter was squarely covered by the judgment of the Madhya Pradesh High Court in *Jayant Vitamins Ltd.* v. *Union of India* reported in (1991) 53 ELT 278. The J.M. observed that crucial point was—Whether the appellant has suppressed any facts or had cleared the goods by misrepresentation, fraud or collusion? According to the J.M., the appellant *bonafide* believed that their product was covered by the exemption notification and on the strength of the certificate from the Drugs Controller and their classification list, duly approved by the department, they had cleared the goods and, therefore, the department was precluded from invoking the proviso to section 11A(1) of the said Act, 1944. In the circumstances, the J.M. set aside the show-cause notices-cum-demands as time barred and allowed all the three appeals filed by the appellant. However, in his concluding paragraph, the J.M. clarified that the appeals stood allowed only on the question of limitation and that he was not recording any order on the merits of the case.

The Technical Member (T.M.) disagreed with the J.M. holding that the product cleared to a pharmaceutical factory alone became "bulk drugs"; that "bulk drugs" cleared to a pharmaceutical factory alone could be manufac-

A tured and sold for diagnosis or treatment or prevention of diseases in human beings and animals; that the appellant was well aware that if they sold their product to a non-pharmaceutical company (consumer), it was evidently intended for non-medicinal use and, therefore, would not be covered by the exemption notification. It was observed that mere obtaining a certificate B from the Drugs Controller by itself would not absolve the appellant, when they knowingly sold a specified quantity to non-pharmaceutical concerns being fully aware that those customers are not going to use the product as drugs or medicines. The T.M. further observed that since the language of the notification was clear and since it did not admit any ambiguity, there was no merit in the plea of the appellant that they *bonafide* believed that C the items were covered by the exemption notification. It was further held that in the present case, the department did not demand duty from the appellant in respect of the quantity sold to pharmaceutical concerns, but the department had demanded duty only in respect of the quantity of sorbitol solution and vitamin 'C' sold to non-pharmaceutical concerns. On facts, the D T.M. came to the conclusion that the appellant had deliberately continued to take benefit of the exemption notification even in respect of the quantity about which they were aware would not constitute a drug or medicine in the normal course. That it was evidently done with the intention to sell to the non-pharmaceutical concerns, which fact was withheld from the department. It was further held that indication of names of the consignees on the E gate passes was by itself not sufficient to exclude the extended period of time available to the department. Accordingly, the T.M. dismissed the appeals.

In view of difference of opinion, the matter was referred by the F President of the Tribunal to a Third Member to decide—Whether the demand was time barred? By the impugned judgment dated 11.1.1999, the Third Member, concurring with the T.M., came to the conclusion that the appellant had wrongly taken the benefit of exemption notification to the extent of sorbitol solution being removed to those, who were not the manufacturers of medicines and who had nothing to do with the diagnosis, G treatment, mitigation or prevention of diseases. It was held that when the appellant diverted their consignments of bulk drugs to non-pharmaceutical concerns, they were not complying with the statutory requirements of the exemption notification. According to the Third Member, "bulk drugs" were products which were normally used for diagnosis, treatment, mitigation or H prevention of diseases in human beings or animals; that they were to be

normally used for specified purposes and that they had to be actually used as bulk drug or as an ingredient in any formulation. It was observed by the Third Member that the appellant had admitted that certain quantity of sorbitol solution, in respect of which duty has been demanded, was cleared in favour of non-pharmaceutical concerns and in the circumstances, the Third Member agreed with the T.M. and accordingly dismissed the appeals.

Being aggrieved by the majority decision, the assessee has come to this Court by way of appeal under section 35L(b) of the Central Excise Act, 1944.

Two points arise for determination, one is on merits and other is on limitation.

Mr. Ravindra Narain, learned advocate appearing on behalf of the appellant submitted, at the outset, that, the impugned majority decision was patently erroneous. In this connection, it was urged that the J.M. had decided the question of limitation in favour of the appellant holding the demands to be time barred and, therefore, he did not decide the question of the applicability of the exemption notification. It was urged that when the T.M. disagreed with the J.M. on the question of limitation, the matter was referred to the Third Member, who while concurring with the T.M., on the question of limitation, erroneously dismissed the appeals instead of referring them back to the Division Bench to decide the question on merits. In the circumstances, it was urged that the impugned majority decision dated 11.1.1999 dismissing the appeals, without going into merits, was patently erroneous.

On the question of applicability of the exemption notification, Mr. Ravindra Narain, learned advocate appearing on behalf of the appellant, submitted that the appellant had obtained a certificate from the Drugs Controller to the effect that the sorbitol solution was a bulk drug within the meaning of "bulk drug" given in the explanation to the notification as they were normally used for diagnosis, treatment, medication or prevention of diseases in human beings. They were normally usable as "bulk drug" or as an ingredient in any formulation. Since the Drugs Controller had issued the certificate in favour of the appellant certifying sorbitol solution as a bulk drug, the appellant's product met the requirement laid down in the exemption notification. According to the learned advocate, the word "normally" as used in the notification has to be assigned a dictionary meaning to mean

A "under normal circumstances" or "ordinarily". The word "normal", according to the learned advocate, is to be read as opposed to the word "exceptional". According to the learned advocate, in using the word "normally", one is referring to something which is opposed to abnormal or exceptional. According to the learned advocate, the word "normally" used in the notiB fication cannot restrict the exemption. That the word "normally" would rule out individual end use of the product. According to the appellant, if it was the intention of the Legislature to restrict use of sorbitol manufacturing units only for diagnosis, treatment, medication etc., nothing prevented the Legislature from using the word "exclusively" instead of the word "normally". According to the appellant, the exemption notification did C not require the manufacturers to ascertain the end use at the time of clearance of bulk drug from the factory. It was urged that once the certificate from the Drugs Controller was issued in terms of the notification no. 234/86, no further requirement remained to be complied with in the matter of taking exemption in the notification. There was no requirement of production of D end use certificate by the assessee in the said exemption notification and in the absence of such provision, the department was not entitled to insist on production of the end use certificate. In the circumstances, it was submitted that the demand of duty made by the department on the bulk drug, manufactured by the appellant, sorbitol solution was without jurisdiction and without authority of law. The authority had wrongly denied legitimate E exemption to the appellant and, therefore, the demand notices were bad-in-law and nullity.

On the question of limitation, it was submitted on behalf of the appellant that they were manufacturing bulk drugs for which they have filed F classification list from time to time under Chapter 29 (Tariff Item 29.42). The department had approved the classification lists. On approval, the appellant had cleared the goods. The department had never objected to such clearances. The appellant was not asked to clear the goods under provisional assessment. The appellant has been filing RT-12 forms from time to time. These forms were approved by the department from time to time. According G to the appellant, as per the proviso to the exemption notification, the manufacturer who sought to take exemption was required to furnish a certificate from the Drugs Controller, to the effect that the drug for which exemption was claimed was a bulk product within the meaning of "bulk drugs" given in the explanation to the notification. It was submitted that on conjoint H reading of the proviso and the explanation, once a certificate of the Drugs

Controller was produced in connection with the goods in question, they were entitled to exemption. It was urged that where two interpretations of the notification exist, the benefit should accrue to the assessee. It was urged that in the present case, the appellant believed that sorbitol solution and vitamin 'C' stood covered under the exemption notification no. 234/86 and the appellant was allowed to clear the said goods by the department. Therefore, it was not open to the department to raise the dispute at a belated stage, by invoking rule 9(2) of the Central Excise Rules, 1944, particularly, when there was no violation of rule 9(1). It was further contended that the normal trade pattern of putting sorbitol solution I.P. in the market was through the distributors and, therefore, it was difficult for the appellant to obtain an end use certificate at the time of clearance of the said goods at the factory gate. Lastly, it was urged that out of quantity, on which duty has been demanded, only 29850 Kgs. have been cleared to non-pharmaceutical units, namely, soaps, ceramics, rubber and cigarette units which represented 3.87% of the total clearances during the period in dispute and, therefore, 96% of the total clearances was to the pharmaceutical concerns and in the circumstances, the department was not right in invoking the extended period of limitation.

Mr. R. Venkataramani, learned senior advocate appearing on behalf of the department submitted that the Third Member to whom the reference was made has recorded a finding that the appellant has not contested the matter on merits. He pointed out that the Third Member to whom the reference was made concluded that the appellant had availed of the benefit of the exemption notification in respect of the quantities of sorbitol solution cleared in favour of non-pharmaceutical companies. Learned senior advocate submitted on behalf of the department that they were not demanding duty in respect of the quantity sold to pharmaceutical concerns for pharmaceutical or medicinal purposes. The department was demanding duty only in respect of that quantity of sorbitol solution which admittedly has been sold to non-pharmaceutical companies, knowing fully well that they would not be used as drugs or medicines. In the circumstances, it was urged that both the questions, of limitation and applicability of exemption notification, have been decided by the impugned decision and in the circumstances, there was no merit in the contention advanced on behalf of the appellant that the Third Member should have referred back the matter to the Division Bench for deciding the question on merits.

On the question of applicability of the notification, learned senior

A advocate appearing on behalf of the department submitted that the word "bulk drug" is defined under section 2(a) of the Drugs (Prices Control) Order, 1979, enacted in exercise of the powers conferred under section 3 of the Essential Commodities Act, 1955. It was urged that the explanation to the exemption notification no. 234/86 has borrowed the definition of B 'bulk drug' from section 2(a) of the Drugs (Prices Control) Order, 1979 to mean any substance including pharmaceutical, chemical, biological or plant product conforming to pharmacopoeial standards accepted under the Drugs & Cosmetics Act, 1940, which is used as such or as an ingredient in any formulation. It was submitted that the certificate issued by the Drugs Controller, in the present case, was a reproduction of the explanation to the C notification. The said certificate did not deal with the uses other than the "normal uses" of such bulk drugs. It was urged that there are distinct categories of bulk drugs, namely, the class of drugs, which are normally used for diagnosis, prevention and mitigation of diseases and "used as such", as opposed to other classes which are not normally used but which are also D capable of being used for the diagnosis, treatment etc. In the circumstances, it was urged that there was no need for using the word "exclusive" as is canvassed on behalf of the appellant. It was submitted that the key expression in the notification, namely, "normally used" and "used as such" should be given their purposive meaning in order to facilitate the taking of the benefit of exemption as also to prevent the abuse of the exemption. The E words "normally used" indicated 'bulk drugs' whose predominant use is for the diagnosis, treatment etc. and which were otherwise capable of being used for other purposes. These bulk drugs stood apart from drugs which may not be normally used in diagnosis, treatment, prevention or mitigation of diseases. The latter class of drugs did not fall within the scope of exemption F notification. Similarly, the first category of drugs referred to above, if and when diverted for other uses, would also get excluded. In the circumstances, the department was right in raising the demand on the appellant.

On the question of limitation, it was urged on behalf of the department that under the Self Removal Procedure, unlike the physical control procedure, the gate passes were not required to be endorsed at the time of removal. G The gate passes used by the appellant were pre-authenticated by the proper officer. The gate passes were required to be supported by the RT-12 returns (monthly returns) to be submitted in terms of rule 173G (3). It was submitted that rule 173B required filing of classification list and rule 173C required H filing of a price list. All that the proper officer was required to do, when

RT-12 returns were filed, was to endorse, approve or disapprove the above list. Therefore, the completion of assessment under the Self Removal Procedure did not relieve the assessee, where exemption was claimed, from giving all details relevant for the purpose of endorsing the contents of the gate passes. It was submitted that clearance to a non-pharmaceutical user without giving further details, except the name of the consignee, would amount to suppression of facts. In the alternative, it was submitted that even assuming for the sake of arguments that the proper officer was either remiss, negligent or in default in not asking for further information, at the time of endorsing the RT-12 returns every month, the omission on the part of the assessee in not disclosing the end use cannot be condoned. The law allows a period of five years to trace the wrong in any manner. In this connection, reliance was also placed on section 11A of the Act. In any event, the satisfaction of the proper officer, even when there is no full disclosure, cannot be said to be final and beyond review. It cannot debar the department from reopening the approvals and assessments. The assessee cannot be permitted to take advantage of its own illegal act. In the circumstances, it was urged that no inference is called for in the present case.

We do not find any merit in the preliminary submission made on behalf of the appellant. In the present case, we are concerned with exemption notification. It is well settled that an exemption notification has to be strictly interpreted. The conditions for taking the benefit of the exemption have to be strictly interpreted. In the present case, the Third Member has rightly rejected the contention advanced on behalf of the appellant that more than one view was possible on interpretation of exemption notification no. 234/86. The Third Member has recorded a finding that the appellant has not disputed that a certain quantity of sorbitol solution and vitamin 'C' stood cleared to non-pharmaceutical units, namely, soaps, ceramics, rubber and cigarette units. The appellant had conceded before the Tribunal of having cleared 3.87% of the total clearances to non-pharmaceutical companies who could not have used the said solution as drugs or medicines. Moreover, in the present case, the department has not demanded the duty in respect of quantity sold to pharmaceutical concerns for pharmaceuticals or medicinal purposes. In the present case, the dispute was not whether the appellant was entitled to the benefit of the exemption notification in respect of the entirety of goods manufactured and cleared during the period in question, but the dispute was regarding the taking of exemption benefit under the notification in respect of the quantum of bulk drugs cleared to consumers other than the

A pharmaceutical concerns. In the circumstances, the Third Member was right in deciding the question of limitation as well as the question of applicability of exemption notification no. 234/86. In any event, the said two questions are interlinked and, therefore, we do not find any merit in the preliminary objection raised on behalf of the appellant.

B

Before going into the question of applicability of the exemption notification and in order to understand the arguments advanced before us, we quote herein below the notification no. 234/86-CE dated 3.4.1986:

C

> *"G.S.R. 593(E):*—In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts bulk drugs, falling under Chapter 28 or Chapter 29 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), from the whole of the duty of excise leviable thereon under section 3 of the Central Excises and Salt Act, 1944:
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> D
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> Provided that the manufacturer furnishes to the proper officer, a certificate from the Drugs Controller to the Government of India, within such period as the said officer may allow, to the effect that the drugs or chemicals which are claimed for exemption under this notification are the bulk drugs within the meaning of the bulk drugs
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> given in the Explanation to this notification, and are normally used for the diagnosis, treatment, mitigation or prevention of diseases in human beings or animals, and used as such or as an ingredient in any formulation.
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> F
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> *Explanation:*— In this notification, "bulk drugs" means any chemical or biological or plant product, conforming to pharmacopoeial standards, *normally used* for the diagnosis, treatment, mitigation or prevention of diseases in human beings or animals, and *used as such* or as ingredient in any formulation."
>
> *(Emphasis supplied by us)*

G

To understand the controversy, we also quote hereinbelow the certificate dated 17.4.1986 issued by the Drugs Controller:

> "This is to certify that the undermentioned Bulk Drugs manufactured by M/s Sarabhai M. Chemicals, a Divn. of Ambalal Sarabhai
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Enterprises Ltd., Baroda, under the Drug Licence number as shown against each are the bulk drugs which can be used in the manufacturer of formulation i.e. drugs which are used for the diagnosis, treatment, mitigation or prevention of diseases in human beings or animals, and used as such or as an ingredient in formulations.

| Sr. No. | Name of Bulk Drugs | Licence No. |
|---|---|---|
| 1. | Ascorbic acid I.P. (Vitamin C) | Form 28 No. G/22 dated 17.3.1981 |
| 2. | Vitamin C 'coated' (Ascorbic acid 'coated') | - do - |
| 3. | Sodium ascorbate U.S.P. | - do - |
| 4. | Sorbitol Solution U.S.P. | Form 25 No. G-55 on 17.3.1981" |

A bare reading of the notification no. 234/86 indicates that the exemption in favour of bulk drugs falling under chapter 28 or chapter 29 of the schedule annexed to the Central Excise Tariff Act, 1985 is not an unconditional exemption. The said notification had a proviso. Under the proviso, the manufacturer was required to furnish to the Competent Authority a certificate from the Drugs Controller to the effect that the drug for which exemption was claimed was a "bulk drug" within the meaning of the expression "bulk drug" given in the explanation to the notification and, which was normally used for diagnosis, treatment etc. in human beings or animals and used as such or as an ingredient in any formulation. The explanation to the notification defines "bulk drugs" to mean any chemical, biological or plant product, normally used for diagnosis, treatment etc. in human beings or animals and used as such or as an ingredient in any formulation. The question is—Whether in the said exemption notification, end use of the bulk drug was made imperative. According to the appellant, mere production of the certificate from the Drugs Controller was sufficient to attract the benefit of the exemption notification. We do not find any merit in this argument. The bulk drug is defined under section 2(a) of the Drugs (Prices Control) Order, 1979 to mean any substance including pharmaceutical, chemical, biological or plant product which is used as such or as an

A ingredient in any formulation. A substance may have several uses other than in drugs/pharmaceuticals. The eligibility for exemption under notification no. 234/86-CE dated 3.4.1986 requires the substance (sorbitol solution) to be actually used in manufacture of drugs/medicines/pharmaceuticals. In other words, sorbitol solution may have different uses. However, sorbitol B solution got the benefit of exemption only when it was used actually in manufacture of drugs/medicines/pharmaceuticals. The exemption was given to a drug. It was not given to a sorbitol solution, which has uses other than in pharmaceuticals. A sorbitol solution could be called a drug for the purposes of exemption only when it was actually used as drug or as an C ingredient in any formulation. The notification no. 234/86 gave exemption to only those substances, which are, in reality, drugs and not to the substances, which are not drugs even though they are capable of acting as drugs. Therefore, the exemption was extendable to sorbitol solution, cleared by the appellant, when used in the manufacture of drugs, medicines, pharmaceuticals. By diverting a specified quantity of sorbitol solution etc. to liquor D units, cigarettes units, soap units etc., the appellant lost the benefit of exemption and in the circumstances, the department was right in raising the aforestated demand.

Our interpretation is supported by the language of the notification. E Under the proviso read with the explanation to the said notification, there were three conditions required to be satisfied by way of certification by the Drugs Controller. Firstly, that the bulk drugs should have the same meaning as mentioned in the explanation to the notification. Secondly, that such bulk drugs should be normally used for the specified purposes; and, thirdly, that F the "bulk drugs" are used as such or as an ingredient in any formulation. Plainly read, the third condition has to mean that the goods, for which exemption was sought, were actually used as such or as an ingredient in any formulation. If the arguments advanced on behalf of the appellant is accepted then the second and third condition would have the same meaning and there would be no point in specifying them as separate conditions. In G the explanation to the notification, we have two expressions, namely, *"normally used"* and *"used as such"*. We have to read both these expressions in *juxta position.* If so read, it becomes clear that the expression "used as such" in the proviso qualifies the actual use and not the capability of use. These words are by way of emphasis. They are a condition to be actually H satisfied before the exemption can be availed and granted. Consequently,

every manufacturer of a bulk drug cannot seek the benefit of exemption under the said notification merely by reason of "normal use" of the drug. The words "normal use" indicate the possible use whereas the expression "used as such" indicates the actual use. The certificates issued by the Drugs Controller, quoted above, shows that they did not deal with uses other than "normal uses" of such bulk drugs. In the circumstances, the Tribunal was right in holding that the benefit of the exemption was available only to those drugs which went into the stream of diagnosis, treatment etc. and not to the use of any other profit making activity. In the circumstances, on the question of applicability of the notification, we do not find any infirmity in the impugned decision of the Tribunal.

Now coming to the question of limitation, at the outset, we wish to clarify that there are two concepts which are required to be kept in mind for the purposes of deciding this case. Reopening of approvals/assessments is different from raising of demand in relation to the extended period of limitation. Under section 11A(1) of the Central Excise Act, 1944, a proper officer can reopen the approvals/assessments in cases of escapement of duty on account of non-levy, non-payment, short-levy, short-payment or erroneous refund, subject to it being done within one year from the relevant date. On the other hand, the demand for duty in relation to extended period is mentioned in the proviso to section 11A(1). Under that proviso, in cases where excise duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded on account of fraud, collusion or wilful mis-statement or suppression of facts, or in contravention of any provision of the Act or Rules with intent to evade payment of duty, demand can be made within five years from the relevant date. In the present case, we are concerned with the proviso to section 11A(1).

In the case of *Cosmic Dye Chemical* v. *Collector of Central Excise, Bombay* reported in (1995) 75 ELT 721, this Court held that intention to evade duty must be proved for invoking the proviso to section 11A(1) for extended period of limitation. It has been further held that intent to evade duty is built into the expression "fraud and collusion" but mis-statement and suppression is qualified by the preceding word "wilful". Therefore, it is not correct to say that there can be suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for invoking the proviso to section 11A.

A In case of *Pushpam Pharmaceuticals Company* v. *Collector of Central Excise, Bombay* reported in (1995) 78 ELT 401, this Court has held that the extended period of five years under the proviso to section 11A(1) is not applicable just for any omission on the part of the assessee, unless it is a deliberate attempt to escape from payment of duty. Where facts are known B to both the parties, the omission by one to do what he might have done and not that he must have done does not constitute suppression of fact.

Applying the tests in the aforestated judgments to the facts of the present case, we find that the demands raised by the department in the impugned three show-cause notices were time-barred. The first show-cause C notice was dated 30.12.1987. It was in respect of period 1.4.1986 to 30.11.1986. The second show-cause notice was dated 6.4.1988. Under the said notice, the department has demanded duty for the period 1.3.1984 to 28.2.1986. The last show-cause notice was dated 20.6.1988, for the period 1.4.1986 to 30.4.1987. Therefore, section 11A(1) was not applicable.

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The question is, whether in the present case, there was any wilful suppression of facts. On facts, as stated above, we find that the appellant had filed a classification list indicating notification no. 234/86 dated 3.4.1986 as well as the chapter under which the goods fell. We have gone through the classification list. It indicates the claim for exemption. The classification E list was duly approved by the department. So also monthly returns were filed by the appellant in the form of RT-12, in which there was a complete disclosure regarding the nature of the goods. These returns were regularly assessed by the department. The material placed on record shows filing of gate passes, invoices, classification list. They indicated the names of the F consignees. A mere reading of these names would indicate that sorbitol solution was sold to non-pharmaceutical companies like, M/s Golden Tobacco Co. Ltd. Despite such disclosure, the department approved the classification list as well as RT-12 returns. There was no reopening of the approvals and assessments within the stipulated period. In the circumstances, the Judicial Member of the Tribunal was right in holding that no G case was made out for invoking the extended period of limitation. As stated above, the end use was built in the exemption notification. Therefore, the department could have demanded duty within one year from the relevant date under section 11A(1). However, this was not done. In the absence of evidence of suppression of facts, the J.M. was right in setting aside the show-H cause notices.

In the case of *Jayant Vitamins Limited* v. *Union of India* reported in (1991) 53 ELT 278, show-cause notice-cum-demand was issued by the department alleging non-user of bulk drugs for specified purpose. In that matter, goods were cleared without payment of duty, as in the present case, on the basis of certificate from Drugs Controller. In that case, same notification no. 234/86 was relied upon by the assessee. However, on facts, the High Court found that the assessee had disclosed the relevant facts in the gate passes and, therefore, it was held that the department was not entitled to invoke the proviso to section 11A(1). In our view, the judgment of the Madhya Pradesh High Court in *Jayant Vitamins Ltd.* (supra), is not on the applicability of the notification no. 234/86, as it is sought to be urged on behalf of the appellant. The said judgment is only on the point of limitation. It only states that the department was not entitled to invoke the proviso to section 11A(1) as the assessee had indicated in the gate passes the material facts. On this point, before concluding, we may mention that in the present case, we have come to the conclusion that there was no wilful suppression of facts on the part of the appellant as the appellant had filed the gate passes, invoices and monthly returns, which were all duly approved by the department from time to time. The invoices, gate passes and the monthly returns indicated the names of the consignees from which it was possible for the department to infer sale of sorbitol solution to non-pharmaceutical companies and yet no steps were taken by the department to raise the demand in time and, therefore, we hold that there was no wilful suppression of material facts for invoking the proviso to section 11A(1). The facts of the present case are not confined only to gate passes clearances. In such cases, it would not be proper to Courts to rely on the evidence furnished only by gate passes.

In the circumstances, although on merits the department succeeds, these appeals need to be allowed as the impugned show-cause notices-cum-demands were time barred and as no case is made out by the department for invocation of the proviso to section 11A(1) of the said Act.

Before concluding, we may point out that numerous judgments were cited on behalf of the appellant under the Food Adulteration Act, the Essential Commodities Act and the matters concerning classification dispute. It is not necessary for us to burden this judgment with those cases, particularly, in view of the fact that in the present case, we are concerned with interpretation of an exemption notification.

A Subject to above, these civil appeals stand allowed. The majority decision dated 11.1.1999 passed in Appeal Nos.E-736/91-C, E-738/91-C and E/747/91-C by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi is hereby set aside. Consequently, the three show-cause-cum-demand notices dated 30.12.1987, 6.4.1988 and 20.6.1988 are B hereby set aside as time barred. In the facts and circumstances of the case, there will be no order as to costs.

K.K.T. Appeals allowed.