COMMISSIONER OF CENTRAL EXCISE, MUMBAI-IV

v.

M/S. DAMNET CHEMICALS PVT. LTD. ETC.

SEPTEMBER 10, 2007

[TARUN CHATTERJEE AND B. SUDERSHAN REDDY, JJ.]

Central Excise Act, 1944:

'CRC 2-26' —Exemption under Notification—Entitlement of—Held: Product 'CRC 2-26' is blended lubricating oil, thus assessee entitled to exemption under the Notification—Notification No. 120/84-CE dated 11.5.1984.

'CRC Acryform'—Exemption under Notification—Entitlement of—Held: 'CRC Acryform' entitled to exemption under the Notification—Product did not carry on it brand name/trade name of a person not entitled to the benefit of Notification—Notification No. 175/86-CE dated 1.3.1986.

S. 11A(1) proviso—Extended period of limitation—Invocation of—Assessee manufacturing product 'CRC 2-26' and 'CRC Acryform'—Demand of duty invoking extended period of limitation—Sustainability of —Held: There was no willful misstatement or suppression of facts by assessee with intent to evade duty with regard to the products or about the relationship between assessee and the company who are bulk buyer of product manufactured by assessee—They are not related persons—Thus, extended period of limitation not available to the Department for initiating the recovery proceedings—Penalty cannot be levied.

Respondent-manufacturer of products 'CRC 2-26' and 'CRC Acryform', claimed exemption under Notification No. 120/84-CE dated 11.5.1984 for the product 'CRC 2-26' and SSI exemption under Notification No. 175/86-CE dated 1.3.1986 for the product 'CRC Acryform'. The Department issued show cause notice to the respondent calling upon as to why excise duty should not be demanded. The Commissioner held that the respondent-assessee was not entitled to exemption of duty under the Notifications for its product. Respondent filed an appeal. Tribunal held in favour of the respondent-assessee. Hence the present appeal.

A **The question which arose for consideration in these appeals were:**

(1) Whether the product 'CRC 2-26' is a blended lubricating oil and thus, entitled to exemption under Notification No. 120/84-CE dated 11.5.1984?

(2) Whether the respondent is entitled to the benefit of Notification No.
B **175/86-CE dated 1.3.1986 in respect of the product 'CRC Acryform'?**

(3) Whether there was any willful misstatement or suppression of facts with intent to evade duty with regard to the products 'CRC 2-26' and 'CRC Acryform' or about the relationship between the respondent and BBL-bulk buyer of product manufactured by assessee so as to enable the Department to
C **invoke the proviso to section 11A(1) of the Central Excise Act, 1944 in show cause notice and whether the demand raised in the said show cause notice is substantially time-barred?**

(4) Whether the Department could impose any penalty?

D **(5) Whether the respondent was a façade or dummy of BBL and/or whether the respondent and BBL are related persons within the meaning of Section 4 (a) and 4 (3) (b) of the Act?**

Dismissing the appeals, the Court

E **HELD: 1.1. The HSN explanatory notes specifically declares that oils classified under the head remain classifiable if various substances have been added to render them suitable for particular uses, provided the product contains by weight 70% or more of petroleum oil or oils obtained from bituminous minerals as the base and that they are not covered by a clear**
F **specific heading. There is no dispute whatsoever the product 'CRC 2-26' to be a preparation containing 70% or more of mineral oil apart from 20% petroleum oil and 3% rust preventives. The product is predominantly a blended lubricating oil. Negligible percentage of rust preventives does not make the product to be a rust preventive one. The plea of the Department that the product is not a lubricating oil is untenable. There is no material or evidence in support**
G **of the said plea. The findings recorded by the Tribunal based on material and evidence available on record does not suffer from any error requiring interference in exercise of appellate jurisdiction. [Para 15] [822-E-H]**

1.2. The test report on 'CRC 2-26' carried out by Professor of IIT categorically stated that 'CRC 2-26' is a blended lubricant and that the
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lubricating oil used in the formulation conforms with the requirements of the Bureau of Indian Standards requirements. The Department did not controvert the expert opinion given by the Professor. The Department itself drew samples on the said products on more than one occasion. The Deputy Chief Chemist gave the test reports and communicated on different occasion that the sample which forms of a liquid is composed of mineral oil and small amount of additives; that the sample is composed of mineral oils and additives, the percentage of mineral oil is more than 70%; and that it is a product primarily used as lubricant though it has anticorrosive properties also. The test reports given by the Chemical Examiner are binding upon the Department in the absence of any other acceptable evidence produced by it in rebuttal. In the instant case, the Department has neither produced any evidence to rebut the reports of the Chemical Examiner nor impeached the findings of the test reports. [Paras 13 and 14] [821-G-H; 822-A-C]

2.1. There is no dispute that the respondent-assessee has been using the trademark 'CRC Acryform' as its own ever since 1987. 'CRC Acryform' bears the mark 'CRC Acryform' which is registered and shown in the trademark certificate. It is true the registration of the trademark on 14.10.1992 after the commencement of lis between the parties by itself may not be binding on the Department but its evidentiary value cannot be altogether ignored. CRC Chemicals Europe had given an affidavit and a certificate specifically stating that they do not manufacture and have not manufactured or sold any product under the name and style "Acryform" or "CRC Acryform" either in India or abroad and they have not claimed any title, right or ownership in the aforesaid names. This affidavit has been ignored altogether by the Commissioner on the ground that it was procured by the respondent-assessee and it was a false document. There is no evidence made available by the Department that the same trade name or brand name is used by some other company apart from the respondent-assessee. There is also no evidence available on record indicating any connection between the 'CRC Acryform' and CRC Chemicals Europe. In the absence of any specific statement in the show cause notice to this effect burden in this regard cannot be cast on the respondent-assessee. Admittedly the use of the logo was discontinued from 1990 and the same was informed to the Department.

[Para 16] [823-B-F]

2.2. The Commissioner mis-interpreted the clause in the agreement relating to the product 'CRC 2-26' and made it applicable to 'CRC Acryform'. The licence agreement dated 30.9.1986 is nothing but extension to the license

A agreement dated 1.10.1983 for 'CRC 2-26' of course in addition permitting the manufacturer of 'CRC Acryform' to label it as such. It is nowhere mentioned in the original license agreement and in the subsequent agreement dated 30.9.1986 that 'CRC Acryform' is a trademark or brand name of CRC Chemicals Europe. The Tribunal upon appreciation of the evidence available on record came to the correct conclusion that respondent-assessee continues B to be a small- scale industry and is entitled to the benefit of Notification No. 175/86 in respect of 'CRC Acryform'. [Para 16] [823-H; 824-A-B]

3.1. It is clear from the material available on record that the Excise Authorities had inspected the manufacture process, collected the necessary C information and details from the respondent-assessee and even collected the samples and sent to chemical analysis. The Authorities were aware of the tests and analysis reports of the products manufactured by the respondent-assessee. The relevant facts were very much within the knowledge of the Department Authorities. The Department did not make any attempt to lead any evidence that there was any willful misstatement or suppression of facts D with intent to evade payment of duty. [Para 19] [825-G-H]

3.2. In order to invoke the proviso to Section 11A(1) a mere misstatement could not be enough. The requirement in law is that such misstatement or suppression of facts must be willful. In the circumstances, it cannot be held that there has been conscious or deliberate withholding of E information by the assessee. There has been no willful misstatement much less any deliberate and willful suppression of facts. Tribunal did not commit any error in holding that the extended period of limitation was not available to the Department for initiating the recovery proceedings under Section 11A (1) of the Act. [Paras 18 and 20] [825-D; 826-A]

F *Anand Nishikawa Co. Ltd.* v. *CCE,* (2005) 188 ELT 149 (SC), referred to.

3.3. The copies of the labels on the product which were furnished to the Department at the time of filing declarations and classification lists contain G information that 'CRC Acryform' was manufactured under the license of CRC Chemicals Europe. The Department had even taken samples of 'CRC 2-26' which had contained labels of the aforesaid product. Non-mentioning of the license agreement in the classification lists does not lead to the conclusion that there has been willful suppression of facts with intent to evade duty. Therefore, the demand in respect of 'CRC Acryform' is totally time barred. H [Paras 21 and 23] [826-B, C, F]

O.K. Play (India) Ltd. v. *Commissioner of Central Excise, Delhi-III, Gurgaon,* (2005) 188 ELT 300 (SC) and *Commissioner of Central Excise, Jamshedpur* v. *Dabur India Ltd.,* (2005) 182 ELT 308 SC, relied on. A

4. There has been no suppression of facts by the respondent-assessee and had not evaded payment of duty thus, the imposition of penalty does not arise. The duty demanded by invoking the extended period of limitation itself B is untenable and unsustainable. [Para 24] [826-G-H]

5.1. The BBL entered into a lease agreement with the respondent-company under the Board Resolution of the company. Mere fact that both the registered offices are situated in the same premises and the manufacturing unit of the respondent-company is situated in the industrial gala owned by C the BBL would not make both the companies related to each other. There is no mutuality of interest between both the companies. BBL does not hold any shares in respondent-company nor the respondent-company owns any shares in BBL. [Paras 26 and 27] [827-E-G]

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5.2. There is no evidence on record in support of the allegation that the transactions between the respondent-company and BBL were not on a principle to principal basis. The Commissioner found that the transaction between both the companies was not a simple relationship between manufacturer and seller, because respondent-company manufactured the product but did not mention its name on the product or carton, but mentioned E that the product was marketed by BBL and put the logo of BBL thereon and that BBL did not pay any consideration to the respondent-company in that regard. This is totally contradictory to the evidence available on record as held by the Tribunal. The name of the manufacturer is also mentioned on the product. [Para 28] [828-B-C]

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5.3. There is no evidence to arrive at any conclusion that there was a hidden flow back of money between both the companies or respondent-assessee received something further from BBL other than the price charged The respondent did not take any loan or advances from BBL. The appellant did not produce any evidence to show that BBL has an interest in the respondent- G company's business. BBL obviously is a distributor and not a relative within the meaning of Section 4 (a) and 4 (3) (b) of the Act. Tribunal found that BBL was a bulk buyer of the product manufactured by the respondent-assessee and there is nothing wrong in giving 40% discount. It was a normal trade practice. In such view of the matter, it cannot be said that the respondent-

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A **assessee and BBL were related persons. The finding arrived at in this regard by the Tribunal is correct. No interference is called for.**

[Paras 28, 29, 30 and 32] [828-C, D, F; 829-B; 830-B]

Metal Box India Ltd. **v.** *Collector of Central Excise, Madras,* **(1995) 75 ELT 449 (SC) and** *Union of India* **v.** *Atic Industries,* **(1984) 17 ELT 323 SC,**
B **referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3821-3823 of 2005.

From the Judgment and Order No. A. 1466-1468/WZB/04/C-III dated
C 22.12.2004 of the Customs, Excise and Services Tax Appellate Tribunal, West Regional Bench Mumbai in Appeal Nos. E/304/2004, E/314/2004 and E/315/2004.

Vikas Singh, ASG. Nagendra Rai, Navin Prakash and B. Krishna Prasad
D for the Appellant.

D.B. Shroff, Faranaaz Karbhari, Ajay Aggarwal, Mallika Joshi and Rajan Narain for the Respondent.

The Judgment of the Court was delivered by

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B. SUDERSHAN REDDY, J. 1. These appeals preferred under Section 35L(b) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') are directed against a common order dated 22.12.2004 passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT') West Regional Bench, Mumbai by which Appeal Nos. E/304/2004, E/314/2004
F and E/315/2004 filed by the respondent-assessee were allowed.

2. The facts briefly stated are as follows:

3. The respondents - M/s. Danmet Chemicals Pvt. Ltd. (hereinafter referred to as 'DCPL') were manufacturing the products 'CRC 2-26 Aerosol'
G and 'CRC Acryform Aerosol' since 1983. They were claiming exemption under Notification No. 120/84-CE dated 11.5.1984 for the product 'CRC 2-26' and SSI exemption under Notification No. 175/86-CE dated 1.3.1986 for the product 'CRC Acryform'. In their declarations they claimed the classification of the products 'CRC 2-26' under Chapter 2710.99 and 'CRC Acryform' under Chapter
H 3203.40.

4. On the basis of the material gathered during the routine transit checks and other information the Department issued show cause notice dated 12.2.1993 to the respondent-assessee calling upon it to show cause as to why Central Excise duty of Rs. 56,69,872.80p should not be demanded and recovered for the period 26.2.1988 to 24.10.1992. In the said show cause notice mainly 4 issues were raised, namely:

(i) That the product 'CRC 2-26' was not a blended lubricating oil and was, therefore, not entitled to the benefit of Notification No. 120/84-CE dated 11.5.1984;

(ii) That the product 'CRC Acryform' was not entitled to the benefit of Notification No. 175/86-CE dated 1.3.1986 inasmuch as the product carried on it the brand name/trademark of a person not entitled to the benefit of the Notification;

(iii) That the respondent-assessee was a dummy or a façade of Bharat Bijlee Ltd. (for short 'BBL') and also that the respondent and BBL were related persons and that therefore the price at which BBL sold the respondent's products should be taken as the assessable value;

(iv) That the respondent-assessee had suppressed the facts with intent to evade duty and therefore the proviso to Section 11A (1) of the Act had been invoked.

5. The Department issued 12 six-monthly show cause notices between 27.10.1997 to 3.4.2003 for the period April, 1997 to 31.10.2002, demanding an aggregate amount of Rs. 22,55,444/-

6. The matter was initially adjudicated by the Commissioner (Adjudication) vide order dated 31.8.1998 which was challenged by the respondent-assessee in appeal and the Tribunal having set aside the order of the Commissioner remitted the case to the Commissioner for *de novo* adjudication. Accordingly, the Commissioner adjudicated all the show cause notices vide his order dated 31.10.2003 whereby and whereunder it was held that the respondent-assessee is not entitled to exemption of duty under Notification No. 120/84-CE for the product 'CRC 2-26' and exemption under Notification No. 175/86-CE in case of product 'CRC Acryform'.

7. Aggrieved by the said decision the respondent-assessee filed an

A appeal against the aforesaid order dated 31.10.2003 passed by the Commissioner, Central Excise, Mumbai-IV. The CESTAT decided all the issues that had arisen for its consideration and accordingly allowed the appeal preferred by the respondent-assessee. We shall refer to those issues adjudicated by the CESTAT in detail appropriately. Being aggrieved by the B decision of the Tribunal, Commissioner of Central Excise, Mumbai-IV preferred these appeals.

8. We have heard Shri Vikas Singh, learned Additional Solicitor General for the appellant and Shri D. B. Shroff, learned Senior Counsel for the respondent-assessee.

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9. Elaborate submissions were made by both the counsel. We have perused the orders passed by the Commissioner as well as the Tribunal. We have also gone through the material available on record.

10. The learned Additional Solicitor General mainly contended that the D product 'CRC 2-26' manufactured by the respondent-assessee cannot be characterized as lubricating oil as it was predominantly anticorrosive in nature and was used for air conditioners, panel boards and other electrical and electronic gadgets primarily to prevent corrosion and for improving electrical properties. It was also submitted that the respondent-assessee was not entitled E to SSI exemption for 'CRC Acryform' since the respondent-assessee manufactured and cleared goods in the brand name of M/s. BBL and also the logo of M/s. CRC Chemicals Europe. Further submission was that DCPL and BBL are related persons and relation led to under valuation of the goods. The respondent-assessee is guilty of suppression of facts warranting invocation of the extended period. F

11. Shri D.B. Shroff, learned senior counsel for the respondent-assessee supported the findings and conclusion recorded by the Tribunal and reiterated the case of the respondent-assessee that he is entitled for the benefit of both the Notifications referred to hereinabove.

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12. Broadly, the following issues arise for our consideration in these appeals namely:

1. Whether the product 'CRC 2-26' is a blended lubricating oil and thus is entitled to exemption under Notification No. 120/84?

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2. Whether the respondent is entitled to the benefit of Notification

No. 175/86 in respect of the product 'CRC Acryform'? A

3. Whether there was any willful misstatement or suppression of facts with intent to evade duty with regard to the products 'CRC 2-26' and 'CRC Acryform' or about the relationship between the respondent and BBL so as to enable the Department to invoke the proviso to Section 11A(1) in show cause notice dated B 12.2.1993 and whether the demand raised in the said show cause notice is substantially time-barred?

4. Whether the Department can impose any penalty?

5. Whether the respondent was a façade or dummy of BBL and/ C or whether the respondent and BBL are related persons within the meaning of Section 4 (a) and 4 (3) (b) of the Act?

ISSUE NO. 1: Whether the product 'CRC 2-26' is a blended lubricating oil and thus is entitled to exemption under Notification No. 120/84? D

13. The material available on record suggests that 'CRC 2-26' mainly contains petroleum base oil 25%, mineral oil 72% and rust preventives 3%. It is the case of the respondent-assessee that these ingredients are blended together with a stirrer until thoroughly mixed. This blended lubricating oil is sold and used as a penetrating lubricating oil by many industries including E government owned for the purposes of lubricating the ball and roller bearings, circuit breakers, connectors, switches, push buttons etc. The petroleum base oil undisputedly is also mineral oil has lubricating properties and is the most important ingredient in 'CRC 2-26'. Its main function is lubrication. It is explained that when it is sprayed on moving parts, the product forms a thin film on the F surface and this film lubricates the parts. The film forming property is called lubricity. As corrosion and rust increases friction amongst moving surfaces, a small percentage of proprietary rust preventives is also added so as to keep the surface rust free as far as possible for effective lubrication by the film. The certificates issued by various industrial concerns including the government industries are part of record. Their genuineness is not put in issue. The test G report on 'CRC 2-26' carried out by Prof. M.C. Dwivedi, Professor of IIT categorically states that 'CRC 2-26' is a blended lubricant and that the lubricating oil used in the formulation conforms with the requirements of the Bureau of Indian Standards requirements. The Department did not controvert the expert opinion given by the Professor. H

A 14. Be that as it may, the Department itself drew samples on the said products on more than one occasion i.e. in 1984, 1990 and 1993. The Deputy Chief Chemist has given the test reports and communicated the same vide letter dated 3.5.1985 stating that the sample which forms of a liquid is composed of mineral oil and small amount of additives; 1990 analysis has been communicated vide letter dated 15.4.1991 stating that the sample is composed B of mineral oils and additives, the percentage of mineral oil is more than 70% and the result of 1993 analysis was communicated vide letter dated 10.1.1994 specifically stating that it is a product primarily used as lubricant though it has anticorrosive properties also. It is well settled and needs no restatement at our hands that the test reports given by the Chemical Examiner are binding C upon the Department in the absence of any other acceptable evidence produced by it in rebuttal. In the present case, the Department has neither produced any evidence to rebut the reports of the Chemical Examiner nor impeached the findings of the test reports.

15. Much reliance was sought to be placed by the Department on the D label affixed on the container which says that " 'CRC 2-26' is a precision blended multi purpose lubricating oil that prevents malfunction due to the deteriorating effects of moisture and corrosion, extends operational life, claims, protects metal, reduces downtime and maintenance." Under the heading Directions, it is mentioned that 'CRC 2-26' is to be used to clean, lubricate, E protect precision mechanism. We fail to appreciate as to how this information contained in the label supports the plea of the Department. It is true that the product in some measures contains anti-corrosive properties. The HSN explanatory notes specifically declares that oils classified under the head remain classifiable if various substances have been added to render them suitable for particular uses, provided the product contains by weight 70% or F more of petroleum oil or oils obtained from bituminous minerals as the base and that they are not covered by a clear specific heading. There is no dispute whatsoever the product in question to be a preparation containing 70% or more of mineral oil apart from 20% petroleum oil. The product is predominantly a blended lubricating oil. Negligible percentage of rust preventives does not G make the product in question to be a rust preventive one. The plea of the Department that the product is not a lubricating oil is untenable. There is no material or evidence in support of the said plea. The findings recorded by the Tribunal based on material and evidence available on record in our considered opinion do not suffer from any error requiring our interference in exercise of our appellate jurisdiction.

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ISSUE NO.2 : Whether the respondent is entitled to the benefit of Notification No. 175/86 in respect of the product 'CRC Acryform' ? A

16. The contention of the Department in this regard mainly was that labels 'CRC Acryform' carried the logos "B" of BBL and 'CRC' of CRC Chemicals Europe, who admittedly are not entitled to the benefit of notification. It was B submitted, in the circumstances 'CRC Acryform' is not entitled to the benefit of Notification No. 175/86. There is no dispute that the respondent-assessee has been using the trademark 'CRC Acryform' as its own ever since 1987. It had applied to the Trademarks Registrar for registering the trademark as early as in the year 1992. The Trademark Registrar has registered 'CRC Acryform' as respondent's trademark on 14.10.1992 with retrospective effect from the C date of use in the year 1987. It is true the registration of the trademark on 14.10.1992 after the commencement of lis between the parties by itself may not be binding on the Department but its evidentiary value cannot be altogether ignored. So far as the CRC Chemicals Europe is concerned it had given an affidavit and a certificate specifically stating that they do not manufacture and D have not manufactured or sold any product under the name and style "Acryform" or "CRC Acryform" either in India or abroad and they have not claimed any title, right or ownership in the aforesaid names. This affidavit has been ignored altogether by the Commissioner on the ground that it was procured by the respondent-assessee and it was a false document. There is no evidence made available by the Department that the same trade name or E brand name is used by some other company apart from the respondent-assessee. There is also no evidence available on record indicating any connection between the 'CRC Acryform' and CRC Chemicals Europe. In the absence of any specific statement in the show cause notice to this effect burden in this regard cannot be cast on the respondent-assessee. Admittedly F the use of the logo was discontinued from 1990 and the same was informed to the Department. So far as the 'CRC Acryform' is concerned it bears the mark 'CRC Acryform' which is registered and shown in the trademark certificate. We are also not impressed by the submission made on behalf of the Department that 'CRC Chemicals Europe' could not have permitted the manufacture of the product and supply the concentrate without having title to the trademark for G the simple reason that the licence agreement referred to and relied upon by the Department merely permits the respondent-assessee to manufacture 'CRC Acryform' from the concentrate supplied by 'CRC Chemicals Europe'. The Commissioner mis-interpreted the clause in the agreement relating to the product 'CRC 2-26' and made it applicable to 'CRC Acryform'. The licence H

A agreement dated 30.9.1986 is nothing but extension to the license agreement dated 1.10.1983 for 'CRC 2-26' of course in addition permitting the manufacturer of 'CRC Acryform' to label it as such. It is nowhere mentioned in the original license agreement and in the subsequent agreement dated 30.9.1986 that 'CRC Acryform' is a trademark or brand name of CRC Chemicals Europe. The Tribunal upon appreciation of the evidence available on record came to the B correct conclusion that respondent-assessee continues to be a small- scale industry and entitles to the benefit of Notification No. 175/86 in respect of 'CRC Acryform'. We find no error in the conclusion so arrived at by the Tribunal.

C *ISSUE No. 3 :* Whether there was any willful misstatement or suppression of facts with intent to evade duty with regard to the products CRC 2-26 and CRC Acryform or about the relationship between the respondent and BBL so as to enable the Department to invoke the proviso to Section 11A(1) of the Act, in the show cause notice D dated 12.2.1993 and whether the demand raised in the said show cause notice is substantially time-barred?

17. The classification lists filed by the assessee from time to time categorically mention in the column relating to the process of manufacture as "blending of various anti-corrosive chemicals and solvents with mineral E turpentine". It is mentioned that the product is a blended lubricating oil manufactured by blending mineral turpentine oil with anti-corrosive in a base of corrosive oil. The stand taken by the assessee is consistent as is evident from the letter dated 20.3.1985 addressed to the Superintendent of Central Excise that they were the manufacturers of 'CRC 2-26' which was a blended lubricant comprising of various anticorrosive oils and mineral turpentine oil F and that the same was fully exempted under Notification No. 120/84. The required information was supplied to the Superintendent of Central Excise when he visited the factory of the respondent-assessee. Samples were again drawn in 1990 and 1993 to determine whether the product was not a lubricating oil. We have already referred to the analysis of the Deputy Chief Chemist who G opined that the samples contained mineral oil which was more than 70% and additives. The chemical test reports so obtained by the Department were never put in issue. No dispute has been raised in this regard. The declarations furnished by the respondent-assessee were totally inconformity with what has been stated in the test reports of the Deputy Chief Chemist. It is true that the exemption under Notification No. 120/84 was applicable to lubricating oil H

and greases which had a primary and permanent function of lubrication and not for the product having a primary function of anti-corrosive protection. But the evidence available on record reveals that the quantum of rust preventives in 'CRC 2-26' is only 3% whereas mineral oil is 70%. The evidence of the people in the trade, testimonials given by them including various government bodies reveal that the product 'CRC 2-26' is primarily used as a lubricating oil. The test reports of the Deputy Chief Chemist coupled with the evidence referred to hereinabove lead to one and only one irresistible conclusion that the product was primarily used for the lubricating purposes. No evidence has been produced by the Department to rebut the voluminous evidence made available by the respondent-assessee.

18. In the circumstances, we find it difficult to hold that there has been conscious or deliberate withholding of information by the assessee. There has been no willful misstatement much less any deliberate and willful suppression of facts. It is settled law that in order to invoke the proviso to Section 11A(1) a mere misstatement could not be enough. The requirement in law is that such misstatement or suppression of facts must be willful. We do not propose to burden this judgment with various authoritative pronouncements except to refer the judgment of this Court in *Anand Nishikawa Co. Ltd.* v. *CCE,* (2005) 188 ELT 149 SC wherein this Court held:

> "We find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. *There must be some positive act from the side of the assessee to find willful suppression.* (emphasis supplied)

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

20. For the reasons aforesaid, we are of the view that the Tribunal did not commit any error in holding that the extended period of limitation was not available to the Department for initiating the recovery proceedings under Section 11A (1) of the Act.

21. So far as 'CRC Acryform' is concerned, the allegation was that the respondent-assessee did not mention about the license agreement in the classification lists. But the fact remains the copies of the labels on the product which were furnished to the Department at the time of filing declarations and classification lists contain information that 'CRC Acryform' was manufactured under the license of CRC Chemicals Europe. The Department had even taken samples of 'CRC 2-26' which had contained labels of the aforesaid product. This Court in *O.K. Play (India) Ltd.* v. *Commissioner of Central Excise, Delhi-III, Gurgaon,* (2005) 188 ELT 300 SC while dealing with the effect of approval of the classification lists observed:

> "The classification lists were duly approved by the department from time to time. All the facts were known to the department, whose officers had visited the factory of the assessee on at least 12 occasions. In the circumstances, we do not find any infirmity in the reasoning given by the Tribunal in coming to the conclusion that there was no willful suppression on the part of the assessee enabling the department to invoke the extended period of limitation under the proviso to Section 11A (1) of the 1944 Act."

22. The same principle is reiterated in *Commissioner of Central Excise, Jamshedpur* v. *Dabur India Ltd.,* (2005) 182 ELT 308 SC.

23. On the facts of the case, we hold that non-mentioning of the license agreement in the classification lists does not lead to the conclusion that there has been willful suppression of facts with intent to evade duty. The demand in respect of 'CRC Acryform' is, therefore, totally time barred.

ISSUE NO. 4: Whether the Department can impose any penalty?

24. The only ground for levying the penalty is that the respondent-assessee had suppressed the facts and had evaded the payment of duty. In view of our conclusion that there has been no suppression whatsoever, the question of imposition of penalty does not arise. The duty demanded by invoking the extended period of limitation itself is untenable and unsustainable for the aforesaid reasons. In such view of the matter no elaborate discussion on this aspect is necessary.

ISSUE NO. 5 : Whether the respondent was a façade or dummy of BBL and/or whether the respondent and BBL are related persons within the meaning of Section 4 (a) and 4 (3) (b) of the Act? A

25. The Department in the show cause notice dated 12.2.1993 alleged that: (i) the assessee-respondent is a dummy/facade of BBL; (ii) the assessee-respondent and BBL are related persons. The assessee in response to show cause inter alia contended that it is a wholly independent and separate company incorporated under the Companies Act, 1956 as early as on 21.5.1983 having two directors, namely Mr. N.J. Danani and his wife. A manufacturing unit was registered as a small-scale unit. It has no borrowings or loans from BBL or any other manufacturing unit. The machineries required for the purposes of manufacturing the products are purchased and owned by the respondent-company. The required raw materials and packing materials for manufacturing and packing the products were always purchased from its own resources and BBL in no manner exercises any supervision or control over the affairs of the respondent-company. B C D

26. It is no doubt true that the registered office of BBL and the respondent-company was located in the same premises. The BBL owns the industrial gala in which respondent's factory exists for which the respondent-company pays market rent for its operation. The BBL before entering into a lease agreement on each occasion obtained a valuation report from an independent Valuer for the purposes of fixing the quantum of rent. The BBL entered into a lease agreement with the respondent-company under the Board Resolution of the company. Mere fact that both the registered offices are situated in the same premises and the manufacturing unit of the respondent-company is situated in the industrial gala owned by the BBL would not make both the companies are related to each other. There is no mutuality of interest between both the companies. E F

27. BBL admittedly does not hold any shares in respondent-company nor the respondent-company owns any shares in BBL. One of the Directors in both the companies appears to be common. The respondent-company was incorporated in 1983 and at that time Mr. N.J. Danani was only an employee of BBL and became its Director in June, 1988 and was one out of seven Directors. It is required to appreciate that the respondent first started manufacturing 'CRC 2-26' in the year 1984. The manufacture of 'CRC Acryform' G H

A was started after September, 1986 but well before Mr. N.J. Danani became Director of BBL.

28. There is no evidence on record in support of the allegation that the transactions between the respondent-company and BBL were not on a principle to principal basis. The Commissioner found that the transaction between both
B the companies was not a simple relationship between manufacturer and seller, because respondent-company manufactured the product but did not mention its name on the product or carton, but mentioned that the product was marketed by BBL and put the logo of BBL thereon and that BBL did not pay any consideration to the respondent-company in that regard. This is totally
C contradictory to the evidence available on record as held by the Tribunal. The name of the manufacturer is also mentioned on the product. There is no evidence to arrive at any conclusion that there was a hidden flow back of money between both the companies. The respondent did not take any loan or advances from BBL. The appellant did not produce any evidence to show
D that BBL has an interest in the respondent-company's business. The appellant however, placed much reliance upon the finding of the Commissioner which is as follows:

> "The respondent had a list price beyond which BBL could not sell and the arrangement between the parties was that BBL would be billed at
E 60% of the list price and that the difference in the prices would recover the cost incurred by BBL for providing security services, and for expenses incurred by respondent for putting the logo and the name of BBL as also the cost of printing the leaflets, advertisement material provided to BBL."

F 29. The Tribunal after elaborate consideration of the matter and upon appreciation of the evidence found that BBL was a bulk buyer of the product manufactured by the respondent-assessee and there is nothing wrong in giving 40% discount. It was a normal trade practice. This Court in *Metal Box India Ltd.* v. *Collector of Central Excise, Madras,* (1995) 75 ELT 449 SC held
G that:

> "If a special trade discount is given to such a customer who is a buyer of 90% of goods, it would amount to a normal trade practice. At any rate it would not be an impermissible trade practice. In fact such type of concessions are usually given by manufacturers whose goods are
H lifted by whole-buyers whose availability avoids lot of marketing and

advertising costs for the manufacturer and also ensures a guaranteed quantity of sales year after year. In order to keep such a wholesale monopolistic buyer attached to it, if under such circumstances by way of business expediency, the manufacturer offers him a special trade discount, it cannot be said that it is not in accordance with normal practice of wholesale trade." A B

30. There is no evidence available on record that the respondent-assessee received something further from BBL other than the price charged. There is no evidence to suggest that the profit made by the BBL had flown into the respondent-company. BBL obviously is a distributor and not a relative within the meaning of Section 4 (a) and 4 (3) (b) of the Act. C

31. This Court in *Union of India* v. *Atic Industries,* (1984) 17 ELT 323 SC held that:

"For treating the customer as a related person, the first part of the definition of 'related person' as given in Section 4 (4) (c) requires that the person who is sought to be branded as a 'related person' must be a person who is so associated with the assessee that they have interest directly or indirectly *in the business of each other.* Thus, it is not enough that the assessee has an interest directly or indirectly in the business of the person alleged to be a related person nor is it enough that the person alleged to be a related person has any interest directly or indirectly in the business of the assessee. It is essential to attract the applicability of the first part of the definition that the assessee and the person alleged to be a related person must have interest direct or indirect *in the business of each other.* The equality and degree of interest which each has in the business of the other may be different; the interest of one in the business of the other may be direct while the interest of the latter in the business of the former may be indirect, but that would not make any difference so long as each has got some interest direct or indirect in the business of the other. In cases, where 50% share of the manufacturing company is held by7 the customer company, the customer company can be said to be having interest in the manufacturing company as a shareholder but for this reason, it cannot be said that the manufacturing company has any interest direct or indirect, in the business carried on by one of its shareholders even though the shareholding of such shareholders D E F G H

A may be 50%. In the absence of mutuality of interest in the business of each other, the customer company holding shares in the manufacturing company cannot be treated to be a 'related person'." (Emphasis supplied)

32. In such view of the matter it cannot be said that the respondent-
B assessee and BBL were related persons. The finding arrived at in this regard by the Tribunal is correct. No interference is called for.

33. In view of our findings, it is not necessary to go into the various alternative submissions made during the course of hearing of these appeals.

C 34. The appeals fail and are accordingly dismissed with no order as to costs.

N.J. Appeal dismissed.