THE TATA IRON AND STEEL CO. LTD., BIHAR

v.

THE COLLECTOR OF CENTRAL EXCISE, PATNA

MARCH 2, 2005

[ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Central Excise Act, 1944—Exemption Notification—Entitlement of—Assessee manufacturing parts of loco wagons and rolling stock at its factory and bringing it to other factory for use in repair and maintenance of transport equipment used within the factory—Benefit of exemption sought—Issuance of show cause notice alleging breach of Notification—Tribunal held that Notification not applicable as the machinery for which parts were meant not installed in the factory but used in factory—Plea that when placed on rail, it can be set to be placed in position, and thus, installed—On appeal, held : For want of some more factual details with regard to installation of machines, matter remanded back for fresh adjudication—Furthermore, the Tribunal failed to consider that the expression 'machinery installed in the factory' not covered in the Headnote of the Notification—As such the Tribunal directed to consider the effect of the absence of the words.

Section 11A—Central Excise Rules, 1944—Rules 9(2) and 196(1) and Chapter X—Assessee manufacturing parts of loco wagons and rolling stock at its factory and bringing it to other factory for use in repair and maintenance of transport equipment used within the factory—Benefit of Notification sought—Issuance of show cause notice proposing duty and penalty for contravention of procedure under Chapter X of Rules by consignee-other factory on failing to intimate actual use of goods received from consignor under Rules 9(2) and 196(1) and section 11A(1)—Authority holding section 11A(1) applicable whereas Tribunal holding notices within time with reference to Rule 196—On appeal, held : Tribunal introduced Rule 196 without giving opportunity to assessee—Assuming that assessee entitled to exemption but the Tribunal did not consider whether the consignee could be proceeded against for not following the procedure under Chapter X and violation of the terms and conditions of the License in proper perspective—Hence, matter remanded back for fresh adjudication.

Words and Phrases :

A *'Install' or 'installed'—Meaning of.*

Appellant-assessee manufactured parts of loco wagon and rolling stock at its factory and brought them to the other factory for repair and maintenance of transport equipments used for moving the material and products within the factory. Appellant sought the benefit of the B Notification No. 281/86 dated 24.4.1986 exempting the excisable products used for repairs and maintenance of machinery, with regard to the parts of loco-wagon and rolling stock falling under Chapter 86 of the Schedule under Central Excise Tariff Act, 1985 manufactured in its factory and brought to other factory for repair and maintenance of transport C equipments used for moving the material and products within the factory. Department issued show cause notices to the appellant's factory alleging breach of the terms and conditions of the Notification. The Tribunal held that locomotive or rolling stock wagon or bogies are moving items and were not so placed or put or fixed in a position as such the benefit of the Notification was not available since it applied to machinery installed in D the factory and not to the machinery used in the factory. Hence, the first and second appeal.

Appellant had sought permission under Rule 192 of Central Excise Rules for bringing parts of loco engine and rolling stock from its factory to the other factory without payment of duty, claiming the benefit of the E notification but the same was refused. Department issued show cause notice to the appellant proposing imposition of duty and penalty for contravention of procedures contained in Chapter X by the other factory-consignee having failed to intimate the actual use of goods received from the appellant's factory-consignor under Rules 9(2) and 196(1) of the Rules F read with proviso to section 11(A)(1) of the Central Excise Act, 1944. With regard to the show cause notices to be within limitation period, the Adjudicating Authority and the First Appellate Authority proceeded as if section 11A(1) was applicable whereas CEGAT held that for raising a demand under Rule 196, limitation under section 11A(1) is not relevant and since no period of limitation is prescribed under Rule 196, notices were G issued within time. Hence the third appeal.

Appellant-assessee contended that the term 'installation' does not mean that it should be embedded to the earth only, but means setting up or fixed in position for use or service; that the wagon and the trucks which were quite heavy are used in the factory premises on fixed rails and when H

they are placed on rails they can be said to be placed in position; and that the CEGAT made out a new case relating to applicability of Rule 196 for the purpose of limitation depriving the appellant of presenting its case.

Respondent-revenue contended that the revenue authorities as well as CEGAT clearly held that the parts were in fact not used for repair or maintenance of machinery installed; that in the common parlance the word "installed" means embedded to the earth with no possibility of movement from one place to another; and that both Rule 196 and section 11A(1) operate in different field.

Remanding the matter to the Tribunal, the Court

HELD : 1. The expression 'install' or 'installed' has to be read in the context of a particular statute keeping in view the factual position and no generalisation can be done. In the instant case, appellant-assessee submitted that the wagon and the trucks which were quite heavy are used in the factory premises on fixed rails and they are not taken out of the factory premises. In that sense when they were placed on rails they can be said to be placed in position. Merely because there is some movement it does not dilute the position that they have been installed. Some more factual details are necessary to be recorded to come to a definite conclusion as to whether the machineries were installed or not. Further, the Notification No. 281/86-CE dated 24.4.1986 has a Head Note which indicates exemption to excisable goods produced and used within the same factory or other factory of the same manufacturer for repairs and maintenance of machinery and does not use the expression "machinery installed in the factory" while the body of the Notification does it. CEGAT has not considered this aspect. Therefore, CEGAT is directed to hear the matter afresh and record a positive finding on the factual aspects and also consider the effect of the absence of words "installed in the factory" in the Head note of the Notification. [467-D; 468-A-D]

Commissioner of Income Tax v. *Sri Rama Vilas Service (Pvt.) Ltd.*, (1960) 38 ITR 25; *Commissioner of Income Tax (Central) Bombay* v. *Saraspur Mills Ltd.*, (1959) 36 ITR 580; *Commissioner of Income Tax* v. *Mir Mohammad Ali*, AIR (1964) SC 1693 and *Sundaram Motors (P) Ltd.* v. *C.I.T.*, (1969) 71 ITR 587 (Mad), referred to.

Engineering Industry Training Board v. *Foster Wheeler John Brown Boild Ltd.*, (1970) 2 All ER 616; *State* v. *Jones*, 89 S.E 2d 129, 131, 242

A N.C. 568; *Smith* v. *Kappas,* 12 S.E.2d 693, 697, 218 N.C. 758; *King* v. *Elliott* 147 S.E. 701, 704, 197 N.C. 93; *De Merritt* v. *Forbes Milling Co.,* 216 P.1086, 114 Kan. 62 and *Metzler* v. *Thye,* 124 P.721, 722, 163 Cal.95, referred to.

Black's Law Dictionary Fifth Edition; *Law Lexicon by T.P. Mukherjee* Fifth Edition; *Webster's New International English Dictionary; The Shorter* B *Oxford Dictionary in English; Fund and Wagnall's New Standard Dictionary; Law Lexicon by P. Ramanatha Aiyar* Second Edition 1997; *Corpus Juris Secundum* Vol. XLIV, referred to.

2. Rule 196 of the Central Excise Rules, 1944 deals with a situation C **of withdrawal for a concession. If any concession has been wrongly or illegally availed Rule 196 permits the proper officer to demand payment of duty leviable on the concerned goods. Section 11(A) of the Central Excise Act, 1944 on the other hand deals with recovery of dues not levied or not paid or short levied or short paid or erroneously refunded. In the instant case, the Authorities themselves proceeded on the basis that the** D **case is covered under Section 11A. CEGAT introduced a new case of Rule 196 without affording any opportunity to the assessee to have its say on this score. The whole issue has been considered bypassing the real issue. [471-D-F]**

3. Even if it is accepted for the sake of arguments that the appellant's E **factory was entitled to exemption under the Notification, the Tribunal did not consider the crucial question whether the Department can proceed against the said consignee for not following the procedure under Chapter-X by failing to account for the goods received from the consignor and if there was any violation of the terms and conditions of Central Excise** F **License No. 6 issued in favour of the consignee, in the proper perspective. [471-H; 472-A-B]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5421 of 1999.

From the Judgment and Order dated 8.6.99 of the Central Excise, G Customs and Gold (Control) Appellate Tribunal, New Delhi in F.O. No. 120/99-B2 in A. No. E/3082 of 1990-B2.

WITH

C.A. Nos. 5836/99 and 5209 of 2001.

H A.K. Ganguli, Ravinder Narain, Ms. Sonu Bhatnagar, Ajay Aggarwal

and Rajan Narain for the Appellant. A

Ms.Binu Tamta, A.Subba Rao, P. Parmeswaran and B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

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ARIJIT PASAYAT, J. These three appeals under Section 35L of the Central Excise Act, 1944 (in short the 'Act') are directed against three separate orders passed by the Customs, Excise and Gold (control) Appellate Tribunal, New Delhi (in short the 'CEGAT').

Civil Appeal No. 5421/1999 relates to the issue whether the benefit of C Notification No. 281/86 dated 24.4.1986 is available to parts of loco wagon and rolling stock manufactured by the assessee-appellant. It concerns show cause notices issued in 1987 to Growth Shop at Adityapur, alleging breach of the terms and conditions mentioned in the aforesaid Notification. The notice relates to the consignor i.e. the Growth Shop. The CEGAT's decision D which is impugned in the said appeal is also based on certain findings recorded in the CEGAT's order which forms the subject-matter of challenge in C.A. No. 5836 of 1999. There also the issue related to the question of eligibility for benefit of exemption of Notification No. 281/86 dated 24.4.1986 in respect of parts of rolling stock manufactured in the appellant's factory (Growth Shop) at Adityapur and brought to the main steel works at Jamshedpur for E use in repair and maintenance of transport equipments used for moving the materials and products within the factory. In the third appeal i.e. C.A. 5209 of 2001 the issue relates to the confirmation of demand of central excise duty amounting to Rs.44,78,167.02 and imposition of penalty of rupees five lakhs. Here again, the show cause notices proposing imposition of duty and penalty F were on the basis that the benefit of aforesaid Notification was not available to the assessee-appellant. The dispute relates to adjudication for alleged contravention of procedures contained in Chapter-X by the consignee, namely, the Main Plant at Jamshedpur. Allegation was that consignee had failed to intimate the actual use of goods received from the Growth Shop at Adityapur. The show cause notice is dated 14.5.1991. G

The assessee-appellant had applied for permission under Rule 192 of Central Excise Rules, 1944 (in short the 'Rules') for getting parts of loco engine and rolling stock falling in Chapter 86 of the Schedule from the growth shop without payment of duty claiming the benefit of the aforesaid Notification. Permission was refused, as according to the revenue, the products H

were not found to be covered under the provisions of the Notification. Show cause notices were issued requiring the appellant to show cause as to why the duty should not be demanded under Rules 9(2) and 196(1) of the Rules read with proviso to Section 11(A)(1) of the Act.

Assessee's stand was that it was fully covered under the Exemption Notification. Revenue on the other hand was of the view that the crucial word used in the Notification was 'installed'. As the goods involved were not relatable to machinery installed in the factory, the benefit was not available.

The Assistant Collector (hereinafter referred to as the 'Adjudicating Authority'), the Collector (Appeals) (hereinafter referred to as the 'First Appellate Authority') as well as the CEGAT held that the Notification had no application as the machinery for which the parts were meant had not been installed in the factory. In the third appeal, the basic issue was whether the show cause notices were issued beyond the prescribed period of limitation. Though the show cause notice indicated that the same was issued in terms of Section 11(A)(1) (proviso) of the Act, the CEGAT held that it is not Section 11(A)(1) of the Act which is really relevant but Rule 196 and since no period of limitation is prescribed therein, the show cause notices were issued within time.

Mr. A.K. Ganguli, learned senior counsel appearing for the appellant submitted that the Notification No. 281/86 exempts the excisable products used for repairs and maintenance of machinery. It does not distinguish between locomotive and any other machineries and the trucks and other transport equipments which undisputedly are covered by the expression "machinery", were exclusively used within the factory for the purpose of carrying raw materials, semi finished goods etc. Parts for maintenance of such trucks and locomotives would definitely qualify for exemption. It was submitted that there is no serious dispute raised by the revenue that the trucks and other transport equipments were machinery. What the revenue has tried to project is that they were not meant for machinery which was installed. The term 'installation' does not mean that it should be embedded to the earth only, but it is used in the sense of introduction or induction. It in essence means to set up or fix in position for use or service. It was further submitted that the CEGAT made out a new case relating to applicability of Rule 196 for the purpose of limitation ignoring the fact that the show cause notice and the orders of the Adjudicating Authority and the First Appellate Authority proceeded on the basis that the action in terms of Section 11A(1) (proviso)

was being taken. The assessee-appellant was, therefore, deprived of presenting its case. In addition, to invoke the extended period of limitation something more than alleging infraction is necessary. There must be an element of *mens rea* or wilful disregard. In any event, Rule 196 and Section 11(A)(1) operate in different fields which are to be harmonised. Even if it is accepted for the sake of argument that no period of limitation is indicated in Rule 196, it cannot be conceived that the Legislature permitted action after unusually long period, thereby unsettling the settled position. There was no wilful mis-statement and in fact the assessee-appellant had disclosed the factual position in all relevant documents, applications and lists.

In response, learned counsel for the revenue submitted that the revenue authorities as well as the CEGAT have clearly held that the parts were in fact not used for repair or maintenance of machinery installed. Even in the common parlance the word "installed" means embedded to the earth with no possibility of movement from one place to another. Therefore, the conclusions cannot be faulted.

So far as the question of limitation is concerned, it is submitted that both Rule 196 and Section 11A(1) operate in different fields. The fact that in Rule 196 there is no prescribed period of limitation goes to show that the legislature never intended to restrict the period under which action can be taken. There was clandestine removal and since the assessee availed concession, it means that there is short payment or non-levy of the duty. The factory i.e. Growth Shop at Adityapur is at a distance of about 8 K.Ms. from the main steel works situated at Jamshedpur. That being so, there is no question of any installation and, therefore, the CEGAT rightly denied the benefit and imposed duty and penalty.

The Exemption Notification which is crucial for the first two appeals reads as follows:

> "Exemption to all excisable goods produced and used within the same factory or other factory of same manufacturer for repairs or maintenance of machinery.
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> In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts all excisable goods manufactured in a workshop within a factory and intended for use in the said factory or in any other factory of the same manufacturer, for repair or maintenance of machinery installed

A therein from the whole of the duty of excise leviable thereon which is specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986).

Provided that where such use is in a factory of a manufacturer, different from his factory where the goods have been manufactured, the B exemption contained in this notification shall be allowable subject to the observance of the procedure set out in Chapter X of the Central Excise Rules, 1944".

The said Notification has been issued in exercise of powers conferred by sub-rule (1) of Rule 8 of the Rules. The Notification consists of two parts. C The first part relates to excisable goods manufactured in a workshop within the factory and intended for use in the said factory. The second part relates to use in any other factory of the same manufacturer for repair or maintenance of machinery installed therein. The expression 'therein' obviously relates to the other factory of the manufacturer. It is significant to note that heading of the Notification does not refer to installation aspect while body of the D Notification does it. In the instant case, there is no dispute that the goods were intended to be used for the purpose of repairs or maintenance of machinery in the other factory of the assessee-appellant. The basic issue, therefore, is whether these machineries were installed in the factory.

E As per Black's Law Dictionary (Fifth Edition), the word 'install' means "to place in a seat, give a place to; to set, place, or instate in an office, rank, or order, etc. To set up or fix in position for use or service.

As per T.P. Mukherjee's Law Lexicon, Fifth Edition, the word 'installed' itself has not been statutorily defined. In view of the extended statutory F definition of the word 'plant' in section 10(5) of the Income Tax Act, 1922 it seems clear that the word 'installed' in relation to the machinery or plant, must be construed to mean such installation as that plant is capable of.

The meaning of the word "installed" as given in Webster's New International English Dictionary is "to set up or fix in position for use or G service as to install a heating or lighting system." The Shorter Oxford Dictionary in English gives as one of the meanings "to place an apparatus, a system of lighting, heating, or the like in position for service or use". Much the same meaning is given in Fund and Wagnall's New Standard Dictionary "to place in position for service or use as to install hot water system".

H In *Commissioner of Income Tax* v. *Sri Rama Vilas Service (Pvt.) Ltd.*,

(1960) 38 ITR 25 at 27 it was held, putting aside the examples given in the dictionary meaning to explain the scope of the word "installed", that "installed" would certainly mean "to place an apparatus in position for service or use". A bus or a lorry is a plant within the meaning of Section 10(2) (vi-b) of the Income Tax Act, 1922. Whether, when a bus or a lorry is purchased and is also put on the road in the course of the business that the assessees carried on, it could be said that the requirement of installation has been satisfied? That the bus or lorry has been set up for use or service when it is put on the road seems clear and in that sense buses or lorries were installed. The statutory test of installation was satisfied by the assessee because such installation as the buses and lorries were capable or was completed.

The assumption that the expression ''installed'' must necessarily mean "fixed in position" at the time when the plant is worked or used does not, seem to be justified. The expression "installed" is also used in the sense of ''inducted or introduced'', and if that be the sense in which that expression is used, there is nothing inconsistent in the context in which that word is used which will justify in holding that the word ''plant'' in Section 10, sub-section (2), clause (vi-b) of the Income Tax Act, 1922 was not intended to include vehicles. [(See *Commissioner of Income Tax (Central) Bombay* v. *Saraspur Mills Ltd.,* (1959) 36 ITR 580 at 581)].

As per P. Ramanatha Aiyar's Law Lexicon, Second Edition 1997, the expression 'installed' did not necessarily mean 'fixed in position', but was also used in the sense of 'intended or introduced'. As held in *Commissioner of Income Tax* v. *Mir Mohammad Ali,* AIR (1964) SC (1693) at (1697) = (1964) 53 ITR 165, installed would certainly mean 'to place an apparatus in position for service or use'. When an engine is fixed in a vehicle it is installed within the meaning of the expression.

The said decision was rendered while interpreting Section 10(2) of the Income Tax Act, 1922. The provisions involved were Section 10(2)(vi) and (via). The issue involved in the said case was whether extra depreciation is admissible under the provisions of Section 10(2)(vi) and Section 10(2)(via) of the Act in respect of diesel oil engines fitted to the motor vehicles in replacement of the existing engines. It was held that the expression 'installed' did not necessarily means fix in position but was also used in the sense of inducted or introduced. It was also held that 'installed' would necessarily mean to place an apparatus in position for service or use. It was therefore held that when any engine is fixed in a vehicle it is installed with the meaning

A of the expression in clauses (vi) and (via) of Section 10(2) of IT Act 1922.

If the plant in combination with other appliances in the business effectuates and perpetuates, the trade of commerce, then, in relation to such plant, as defined in Income Tax Act, 1961 "installed' means such induction or introduction whereby the plant may be placed in a position for service or B use in the business. (See *Sundaram Motors (P) Ltd.* v. *C.I.T.*, (1969) 71 ITR 587, 593 (Mad.).

The word 'installation' means the bringing of an entire piece of plant on to a site and putting into position on the site. It does not mean that putting together of parts, piece by piece, pipe by pipe, bolt by bolt, weld by weld, C until it gradually becomes one whole. (See *Engineering Industry Training Board* v. *Foster Wheeler John Brown Boild Ltd.*, [1970] 2 All ER 616, 619 (CA).

As per Corpus Juris Secundum, Vol. XLIV, the word 'install' means D 'generally, to place or set in a seat or give a place to; to set, place, or instate in an office, rank, or order; to establish one in a place or position.

In Builders' terminology, to set in place, to connect up, and fix ready for use; and, specifically applied to machinery, the word has a technical meaning, which is to set up or fix in position for use or service; to place E machinery in that position where it will reasonably accomplish the purposes for which it is set up; to set or fix for use or service, as to install a lighting system.

As applied to machinery, the word has a technical meaning, and refers to the whole of a system of machines, apparatus, and accessories set up and F arranged for working, as in electric lighting, transmission of power, etc. In this sense "installations" may be synonymous with "appliances".

As per Words and Phrases, Permanent Edition, Vol. 21-A the word 'install' means to set up or fix. (See *State* v. *Jones*, 89 S.E.2d 129, 131, 242 N.C. 63).

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"Installed" means to set or fix, as a lighting system, for use or service. (See *Smith* v. *Kappas*, 12 S.E.2d 693, 697, 218 N.C. 758).

The word "install" meant to set up or fix in position for use or service. (See *King* v. *Elliott*, 147 S.E. 701, 704, 197 N.C. 93).

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Where a contract for the sale of a cleaning attachment to a steam boiler allowed the buyer 60 days after it was installed in which to make a trial of its effectiveness, installation is held to have been complete when the cleaner was affixed to the boiler, although by reason of the plant not being operated no test of it was made until later. (See *De Merritt* v. *Forbes Milling Co.,* 216 P.1086, 114 Kan. 62).

Notwithstanding Civ. Code, pp.1645, 1654, 1656, providing that technical words in contracts must be interpreted as understood by persons in the business to which they relate, and that in cases of uncertainty a contract must be interpreted most strongly against the party causing the uncertainty to exist, and that all things necessary to carry a contract into effect are implied therefrom, a lease, which required the lessee to "install a sidewalk elevator from the basement to the sidewalk" in front of the premises, does not require the lessor to prepare the premises for the installation of the elevator; but the lessee must provide a suitable lift with the usual accessories connecting the basement with the sidewalk; the word "install" meaning to set up or fix in position for use or service. (See *Metzler* v. *Thye*, 124 P.721, 722, 163 Cal.95).

As the words 'install' or 'installed' go to show, much would depend upon the context in which the expression is used in a particular statute and no generalisation can be done.

The benefit of the exemption is available under the exemption notification if (1) excisable goods are manufactured in a workshop within the factory; (2) goods are intended to use in the said factory or in any other factory of the same manufacturer; (3) goods are intended for use for repairs or maintenance of machinery installed in the other factory; and (4) Chapter X procedure is followed if goods are used in the factory different from the factory of production.

The CEGAT in the first two appeals was of the view that the machinery which is installed has to be placed or put or fix in a position. A locomotive or rolling stock wagon or bogies are not so placed in position. According to the CEGAT the machines may have moved parts and they may move to make the machine functional, but such machines themselves do not have to move. The locomotives and other items involved are moving items and cannot be said to have been installed in the factory. They must be used in the factory for moving or carrying the materials. It was held that the Notification applied to machinery installed in the factory and not to the machinery used in the factory.

A As noted above, the expression has to be read in the context of the statute keeping in view the factual position. It was submitted by learned counsel for the assessee-appellant that the wagon and the trucks which were quite heavy are used in the factory premises on fixed rails and they are not taken out of the factory premises. In that sense when they were placed on rails they can be said to be placed in position. Merely because there is some B movement it does not dilute the position that they have been installed. We feel some more factual details are necessary to be recorded in this regard to come to a definite conclusion as to whether the machineries were installed or not. Further, the Notification No. 281/86-CE dated 24.4.1986 has a Head Note which has been quoted above. It indicates exemption to excisable goods C produced and used within the factory for repairs and maintenance of machinery. It does not use the expression "machinery installed in the factory". This aspect has not been considered by the CEGAT. Therefore, it would be appropriate for the CEGAT to hear the matter afresh and record a positive finding on the factual aspects, keeping in view the decision in Mir Mohammad's case (supra) and the definitions noted above. It shall also D consider the effect of the absence of words "installed in the factory" in the Head note of the Notification. We make it clear that we have not expressed any opinion on the factual aspects of the case.

The residual question is, even if it is held that the benefit under the E Exemption Notification is not available whether the notices issued can be said to be within the period of limitation. Undisputedly, the Adjudicating Authority and the First Appellate Authority proceeded on the basis as if Section 11A(1) was applicable to the facts of the case. The CEGAT on the other hand was of the view that there was no warrant to impose limitation under Section 11A(1) of the Act for raising a demand under Rule 196. That F is the subject-matter of dispute in Civil Appeal No. 5209 of 2001.

This issue needs to be carefully considered. Rules 192, 196 and Section 11A(1) as they stood at the relevant point of time read as follows:

> "*Rule 192- Application for concession* - Where the Central Government G has, by notification under rule 8, or section 5A of the Act, as the case may be, sanctioned the remission of duty on excisable goods other than salt, used in a specified industrial process, any person wishing to obtain remission of duty on such goods, shall make application to the Commissioner in the proper form stating the estimated annual quantity of the excisable goods required and the purpose for and the H

manner in which it is intended to use them and declaring that the goods will be used for such purpose and in such manner. If the Commissioner is satisfied that the applicant is a person to whom the concession can be granted without danger to the revenue, and if he is satisfied, either by personal inspection or by that of an officer subordinate to him that the premises are suitable and contain a secure store room suitable for the storage of the goods, and if the applicant agrees to bear the cost of such establishment as the Commissioner may consider necessary for supervising operation in his premises for the purposes of this Chapter, the Commissioner may grant the application, and the applicant shall then enter into a bond in the proper form with such surety or sufficient security in such amount and under such conditions as the Commissioner approves. Where for this purpose, it is necessary for the applicant to obtain an Excise registration certificate, he shall submit the requisite application along with the proof for payment of registration fee and shall then be granted a registration certificate in the proper form. The concession shall unless renewed by the Commissioner cease on the expiry of the registration certificate.

Provided that, in the event of death, insolvency or insufficiency of the surety, or where the amount of the bond is inadequate, the Commissioner may, in his discretion, demand a fresh bond; and may, if the security furnished for a bond is not adequate, demand additional security.

Rule 196- Duty leviable on excisable goods not duly accounted for- (1) If any excisable goods obtained under Rule 192 are not duly accounted for as having been used for the purpose and in the manner in the application or are not shown to the satisfaction of the proper officer to have been lost or destroyed by natural causes or by unavoidable accident during transport from the place of procurement to the applicant's premises or during handling or storage in the premises approved under rule 192, the applicant shall, on demand by the proper officer, immediately pay the duty leviable on such goods. The concession may at any time be withdrawn by the Commissioner if a breach of these rules is committed by the applicant, his agent or any person employed by him. In the event of such a breach, the Commissioner may also order the forfeiture of the security deposited under rule 192 and may also confiscate the excisable goods, and all

goods manufactured from such goods, in store at the factory.

(2) Where the duty becomes chargeable in terms of sub-rule (1) on any excisable goods, the rate of duty and the tariff valuation, if any, applicable to such goods shall be the rate and valuation in force-

(i) in the case of actual removal of goods from the premises, on the date of such removal;

(ii) in the case of loss of goods in transit during transport from the place of procurement to the applicant's premises, on the date on which the goods are received in the applicant's premises;

(iii) in the case of goods while in storage or during handling in the premises approved under rule 192, on the date on which such loss is discovered by the proper officer or made known to him;

(iv) in all other cases, on the date on which the notice for demand of duty is issued or on the date on which duty is paid, whichever is earlier.

11A(1): Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded - (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, for the words "six months" the words "five years" were substituted.

Explanation - Where the service of the notice is stayed by an order

of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be."

As the heading of the Rule 196 itself goes to show it relates to duty leviable on excisable goods not duly accounted for. Rule 192 speaks of application for concession. Rule 196 provides that if any excisable goods obtained under Rule 192 are not duly accounted for as having been used for the purpose and in the manner stated in the application or are not shown to the satisfaction of the proper officer to have been lost or destroyed by natural causes or by unavoidable accident during transport from the place of procurement to the applicant's premises or during handling or storage in the premises approved under Rule 192, the applicant shall on demand by the proper officer immediately pay the duty leviable on such goods. It further provides that the concession may be withdrawn if a breach of the rules is committed by the applicant, his agent or any person employed by him. In the event of such breach, power is given for forfeiture of the security deposited under Rule 192 and for confiscation of the excisable goods and all goods manufactured from such goods in store at the factory. In other words, Rule 196 deals with a situation of withdrawal for a concession. If any concession has been wrongly or illegally availed Rule 196 permits the proper officer to demand payment of duty leviable on the concerned goods.

Section 11(A) on the other hand deals with recovery of dues not levied or not paid or short levied or short paid or erroneously refunded.

In the instant case, the authorities themselves proceeded on the basis that the case is covered under Section 11A. The CEGAT introduced a new case of Rule 196 without affording any opportunity to the assessee to have its say on this score.

We find that the whole issue has been considered bypassing the real issue. The show cause notice refers to adjudication for contravention of Chapter-X procedure by the Main Plant at Jamshedpur (hereafter referred to as the 'consignee'). According to the show cause notice, the said consignee had failed to intimate the actual use of goods received from Growth Shop, Adityapur.

It has to be noted that the show cause notices of 1987 dealt with breach of Exemption Notification by the consignor whereas the show cause notice dated 14.5.1991 dealt with breach of terms and conditions of license issued in favour of the said consignee who failed to intimate the actual use of the

A inputs in question. Even if it is accepted for the sake of arguments that Growth Shop was entitled to exemption under the above Notification, the crucial question is whether the Department can proceed against the said consignee for not following the procedure under Chapter-X if there was any violation of the terms and conditions of Central Excise License No. 6 issued in favour of the Main Plant. This crucial issue has not been considered in the B proper perspective by CEGAT. The basic question is whether the Main Plant, Jamshedpur failed to account for the goods received from Growth Shop, Adityapur.

The matter is remanded to CEGAT for fresh adjudication keeping in C view the legal position indicated supra.

The appeals are disposed of accordingly with no order as to costs.

N.J. Appeals disposed of.