IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Before:
The Hon'ble Justice Debangsu Basak
And
The Hon'ble Justice Aryak Dutt

CEXA 9 Of 2011
M/s. Hindalco Industries Limited
Vs.
Commissioner of Central Excise, Kolkata-II

For the Appellants	:	Mr. Rahul Tangri Ms. Taniya Roy
For the Respondents	:	Mr. Kaushik Dey Mr. Tapan Bhanja Mr. Gourab Karmakar
Hearing Concluded On	:	19.08.2026
Judgment Delivered On	:	10.09.2026

Aryak Dutt, J.:

1. This appeal under Section 35G of the Central Excise Act, 1944 ("the Act") is directed against the order dated 22nd December, 2010, passed by the Customs, Excise and Service Tax

Appellate Tribunal, Kolkata, whereby the Tribunal had set aside four Orders-in-Appeal dated 26th February, 2010 and restored the four Orders-in-Original dated 29th August, 2007 confirming a demand of Rs. 6,29,920/- together with interest and penalty against the appellant. The appeal was admitted on the following substantial questions of law:

> *A) Whether, on the facts and in the circumstances of the case, the extended period of limitation under the proviso to Section 11A(1) of the Central Excise Act, 1944 could be invoked, where the demand was founded solely upon figures appearing in the Cost Audit Report, being a statutory record maintained by the assessee and produced before the Department, and where the facts constituting the basis of the demand were within the knowledge of the Department at all material times; and whether, for the purpose of the said proviso, it is the absence of knowledge on the part of the Department of the material fact, or a positive and deliberate act of suppression of that fact on the part of the assessee, that is relevant?*
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> *B) Whether the learned Tribunal committed a substantial error of law in setting aside the order of the Appellate Authority*

without recording any finding that the Department did not have sufficient knowledge of the facts which led to the demand of duty, interest and penalty?

C) Whether mandatory penalty is imposable under Section 11AC of the Central Excise Act, 1944?

2. The appellant is a large-scale manufacturer of aluminium and availed CENVAT credit of central excise duty paid on inputs used in the manufacturing of its final products. The period in dispute is Financial Years 2001-02 and 2002-03. The sequence of events out of which the dispute arises is not in controversy and may be shortly stated.

3. By a letter dated 5th February, 2001, the appellant intimated the Department in advance of its annual stock verification and invited the Department to depute officers to attend. Annual stock taking was thereafter conducted on 10th February, 2001, 9th February, 2002 and 8th March, 2003, the latter two falling squarely within the period in dispute, in the presence of departmental officers. The stock verification reports recorded the physical position of inventory, including every excess and every shortage of aluminium at each stage of manufacturing.

4. On 26th September, 2003, the Cost Auditor prepared the Cost Audit Report for the year ending 31st March, 2003, drawing upon those very stock-taking reports. In conformity with the Cost Audit (Report) Rules, 2001, the Report set out the results of physical verification of inventory for the year 2002-03 and for the two preceding years, reflecting the excesses and shortages of Raw Materials, Work-in-Progress, Finished Goods, Scrap and Wastage. It is recorded, and not controverted, that the excesses and the shortages offset one another during the relevant period, so that there was no net shortage.

5. On 16th December, 2004, officers of the Department visited the appellant's premises for audit. The appellant produced its financial and statutory records, including the Cost Audit Report. Upon perusal of those records the Department issued a spot memo recording that there were shortages of Raw Materials, Work-in-Progress, Finished Goods, Scrap and Wastage during 2000-2003 on which CENVAT credit ought to be reversed. Notwithstanding that the Department was thus in possession of the entire factual foundation of the proposed demand by 16th December, 2004, no notice issued for nearly sixteen months thereafter. Four even-dated Show Cause Notices came to be issued only on 3rd April, 2006, invoking the extended period of limitation. The sole averment in those notices touching limitation thus reads: *"The said assessee had never before disclosed the fact of their non-compliance of the statutory bindings to the Central Excise Authorities thereby attracting the extended proviso to Section 11A of the Central Excise Act, 1944".*

6. By four Orders-in-Original dated 29th August, 2007, the demand was confirmed, the Adjudicating Authority reasoning that the absence of any attempt by the appellant to bring the shortages and excesses to the notice of the Department amounted to suppression. The Commissioner (Appeals), by four Orders-in-Appeal dated 26th February, 2010, upheld the demand on merits but had set it aside on limitation, holding that the demand rested entirely upon the Cost Audit Report, a statutory record maintained by the appellant. The Tribunal reversed that view, and hence this appeal.

7. Learned Counsel appearing for the appellant submitted that the proviso to Section 11A(1) is attracted only where non-levy or short-levy is occasioned by reason of fraud, collusion, wilful mis-statement, suppression of facts, or contravention with intent to evade duty, and the burden of establishing these ingredients lies squarely upon the Revenue. He further submits that the Department was present at the annual stock verification and was therefore aware of the very shortages now alleged and that the Cost Audit Report is a statutory record, which Rule 22 of the Central Excise Rules, 2002 empowers the Department to call for and obliges the assessee to produce; that the statutory returns contained no column requiring disclosure of such shortages; and that the Show Cause Notices contain no plea of suppression worth the name. Reliance was placed on the following judgments:

(i) ***Larsen & Toubro Ltd. v. CCE,*** reported in ***Pune-II, 2007 (211) E.L.T***. ***513 (S.C.)***;

(ii) ***Prolite Engineering Co. v. Union of India***, reported in ***1995 (75) E.L.T. 257 (Guj.)***; ***CCE,***

(iii) ***Noida v. Accurate Chemical Industries***, *reported in* ***2014 (310) E.L.T. 441 (All.)***; ***CST,***

(iv) ***Kolkata v. Electro Steel Casting Ltd.***, *reported in* ***2025 (5) TMI 1218 (Cal.)***;

(v) ***Commissioner of Central Tax v. ABB Ltd.***, *reported in* ***2022 SCC OnLine Kar 1132; CCE***,

(vi) ***Mangalore v. Pals Microsystems Ltd.***, *reported in* ***2011 (270) E.L.T. 305 (S.C.)***; *and*

(vii) ***Mopeds India Ltd. v. Collector of Central Excise***, *reported in* ***1991 (56) E.L.T. 241 (Tri.)***, ***affirmed at 1991 (53) E.L.T. A79 (S.C.)***.

8. Learned Senior Standing Counsel for the Revenue, resisting the appeal, has placed principal reliance upon the Division Bench judgment of the Gujarat High Court in ***Commissioner of C. Ex., Surat-I v. Neminath Fabrics Pvt. Ltd.***, reported in ***2010 (256) E.L.T. 369 (Guj.)***. It was urged that the only point of reckoning for computing the period of one year or of five years is the "relevant date" as defined in Section 11A(3)(ii) and that the concept of knowledge on the part of the departmental authority is entirely absent from the statutory scheme; that to import it would be to rewrite the provision and to render the defined expression "relevant date" nugatory; and that suppression, once it exists, is not obliterated merely because the Department subsequently acquires knowledge of the irregularity.

9. Section 11A(1) of the Act, as it stood at the material time, empowered a Central Excise Officer to serve notice within one year from the relevant date upon a person chargeable with duty not levied, not paid, short-levied, short-paid or erroneously refunded. The proviso substituted "five years" for "one year" in a case where such non-levy or short-levy occurred by reason of fraud, collusion, any wilful mis-statement or suppression of facts, or contravention of any provision of the Act or of the rules made thereunder with intent to evade payment of duty. Sub-section (3)(ii) defines the expression "relevant date".

10. The provision thus poses two distinct and sequential enquiries, and the distinction between them lies at the heart of this appeal. The first is anterior and jurisdictional: do the ingredients described in the proviso in fact exist, that is to say, is the escapement of duty attributable to fraud, collusion, wilful mis-statement, suppression of facts, or contravention with intent to evade duty? That is a question of fact on which the burden lies wholly upon the Revenue. The second enquiry arises if, and only if, the first is answered in the affirmative: from what point, and for what span, is the notice to be reckoned? On that question the statute is exhaustive, prescribing five years from the “relevant date” as defined. The first enquiry governs the availability of the extended period; the second governs its measurement. Authorities addressed to the second cannot be transplanted to resolve the first, and it is precisely that transplantation which the Revenue invites us to make.

11. In the case of ***Neminath Fabrics (supra)*** it was decided that, and with respect decides correctly that once the ingredients of the proviso are satisfied, a Tribunal cannot substitute a fresh period of limitation of six months running from the date on which the Department acquired knowledge. The Gujarat High Court held that the concept of knowledge cannot be read into Section 11A by any stretch of imagination, because it would render the defined expression “relevant date” nugatory, and because a period of limitation fixed by the legislature can neither be curtailed nor enlarged by judicial decision or by subordinate legislation. That reasoning is unexceptionable and we respectfully adopt it.

12. However, ***Neminath Fabrics (supra)*** is careful to mark out the boundary of its own holding. In paragraph 18 the Learned Judges has held in terms that the proviso comes into play only when suppression is established or stands admitted, and that such a case would differ from one where fraud is merely alleged and is disputed by an assessee. That sentence is dispositive of the present appeal. ***Neminath Fabrics (supra)*** was decided on a record in which suppression stood admitted. The Director of the assessee admitted the shortage of 1,93,717.50 L. Mtrs. of grey fabric and admitted its clandestine removal without invoices and without payment of duty. The merchant manufacturers who received the goods corroborated the admission in their statements. The goods had never been entered in the Daily Stock Account Register or in the Lot Register. The Court recorded, in paragraph 26, that suppression stood admitted by the assessee and established by the evidence on record, and that as a natural corollary the proviso to sub-section (1) of Section 11A would stand attracted.

13. The corollary of that reasoning is that where suppression is neither admitted nor established, the proviso does not stand attracted at all, and the question of computing five years from the relevant date never arises. The Gujarat High Court itself drew exactly this line while distinguishing ***Commissioner of Central Excise and Customs v. Kwality Tube Industries***, reported in ***2009 (240) E.L.T. 20 (Guj.)*** and observed that , in paragraph 25, the alleged shortage was itself doubtful, and that when fraud and suppression are not established the matter stands on a different footing.

14. The present case stands on that different footing. There is no admission here, no statement of any officer of the appellant conceding removal, no evidence of clandestine clearance, no buyer, transporter or purchaser traced, no unaccounted receipt or payment, and no entry omitted from any register which the appellant was bound to maintain. There is nothing beyond a figure appearing in the appellant's own statutory record, prepared by a Cost Accountant in discharge of a statutory obligation, and handed to the Department when the Department asked for it.

15. We must further observe that departmental knowledge is invoked by the appellant before us for a purpose wholly different from that condemned in ***Neminath Fabrics (supra)***. The appellant does not ask us to substitute a six-month period of limitation running from the date of knowledge. The appellant asks us to treat the Department's contemporaneous knowledge as a fact from which the absence of suppression is to be inferred. That is a permissible, and indeed a necessary, use of the fact. Suppression is a relational concept, presupposing a person from whom something is kept back. One cannot suppress from another that which the other already possesses, and possesses because one has oneself invited him to come and see it. To say so is not to read the word "knowledge" into the statute; it is to give the word "suppression" the meaning it bears in the statute.

16. Turning then to the ingredients of the proviso, the expression "suppression of facts" keeps company there with "fraud", "collusion" and "wilful mis-statement", and takes its colour from that company. In ***Pushpam Pharmaceuticals Co. v. CCE, Bombay***, reported in ***1995 (78) E.L.T. 401 (S.C.)***, the Hon'ble Supreme Court held that suppression in this context means a deliberate act of withholding information which the assessee knew he was obliged to disclose. ***In Cosmic Dye Chemical v. CCE, Bombay***, reported in ***1995 (75) E.L.T. 721 (S.C.)***, it was held that mis-statement or suppression must be wilful and coupled with intent to evade duty. To the same effect are ***Anand Nishikawa Co. Ltd. v. CCE***, reported in ***2005 (188) E.L.T. 149 (S.C.)***, and ***Continental Foundation Jt. Venture v. CCE, Chandigarh***, reported in ***2007 (216) E.L.T. 177 (S.C.)***. Mere failure to pay, or the mere discovery of a discrepancy, does not supply the missing element, as held in ***Uniworth Textiles Ltd. v. CCE, Raipur***, reported in ***2013 (288) E.L.T. 161 (S.C.)***.

17. The Adjudicating Authority proceeded on the footing that the appellant's failure to bring the shortages and excesses to the notice of the Department was itself suppression. That reasoning inverts the statutory burden. It converts the Revenue's obligation to prove a positive act of concealment into an obligation on the assessee to volunteer information it was never require to furnish. If accepted, it would render the proviso applicable to every demand, for in every demand there is by definition something the assessee did not report. The proviso would then swallow the main section, and the period of one year would cease to exist.

18. Furthermore, is it the Revenue's case that any column or field in the periodical returns prescribed under Rule 12 of the Central Excise Rules, 2002 called for disclosure of the shortages or excesses reflected in the Cost Audit Report. Non-disclosure in a return of that which the return does not require to be declared cannot constitute suppression, as held in ***Prolite Engineering Co. v. Union of India***, reported in ***1995 (75) E.L.T. 257 (Guj.)***, a principle which we respectfully adopt.

19. The Cost Audit Report itself was prepared annually by a Cost Accountant pursuant to Section 233B of the Companies Act, 1956, read with the Cost Audit (Report) Rules, 2001, and formed part of the appellant's annual financial statements. Rule 22 of the Central Excise Rules, 2002, expressly entitles the proper officer to enter and search the registered premises and to require the assessee to make available, *inter alia*, the cost audit report under Section 233B of the Companies Act, 1956. It follows that the very document on which the Department founds its charge of concealment is a document which the law compelled the appellant to prepare, to preserve and to produce on demand, and which the law empowered the Department to call for at any time. A demand built entirely upon such a document cannot simultaneously be a demand built upon suppression. The two propositions cannot stand together.

20. This Court has already taken that view in ***Commissioner of Service Tax, Kolkata v. M/s. Electro Steel Casting Ltd.***, reported in ***2025 (5) TMI 1218 (Cal.)***, holding that the extended period is not available where the entire basis of the demand is information contained in the assessee's own books of account, financial statements or statutory records. The Karnataka High Court is to the same effect in ***Commissioner of Central Tax v. ABB Ltd.***, reported in ***2022 SCC OnLine Kar 1132***. Where the discrepancy was available in the assessee's records and was capable of detection by the jurisdictional officers upon proper and timely scrutiny, the extended period cannot be invoked merely because the officers chose to examine those records later than they might have, as held in ***CCE, Noida v. Accurate Chemical Industries***, reported in ***2014 (310) E.L.T. 441 (All.).***

21. There is a further circumstance which admits of no elaboration but is worth stating plainly. The appellant wrote to the Department inviting it to attend the annual stock verification. Departmental officers attended on 9th February, 2002 and on 8th March, 2003, both within the period in dispute. The physical position of inventory, including every excess and every shortage now complained of, was recorded in their presence. Conduct of that character is the antithesis of concealment. An assessee who summons the Revenue to watch him count his stock is not an assessee who is hiding his stock.

22. As to the pleading, in ***Larsen & Toubro Ltd. v. CCE, Pune-II,*** reported in ***2007 (211) E.L.T. 513 (S.C.)***, the Hon'ble Supreme Court held that the ingredients constituting fraud or suppression must be specifically pleaded in the Show Cause Notice, so that the noticee may effectively meet the allegation.

The notices before us contain a single sentence, already extracted, asserting that the appellant had never before disclosed the fact of its non-compliance with the statutory bindings. That averment identifies no fact suppressed, no obligation of disclosure breached, no act of concealment and no intent to evade. It is a conclusion unsupported by a single particular. An assessee cannot answer a charge that has not been made, and an adjudicating authority cannot confirm a charge that was never laid.

23. The delay is also material. The Department acquired complete knowledge of the alleged shortages on 16th December, 2004 and recorded that knowledge in a spot memo. It then did nothing for nearly sixteen months, issuing notice only on 3rd April, 2006. We are conscious of ***Neminath Fabrics (supra)*** and we do not treat this delay as generating any fresh period of limitation. We treat it as evidence. A Department which genuinely believed itself to be confronted with deliberate evasion, and which held the proof of it in its hands in December 2004, does not sit upon that proof for sixteen months. The delay is a circumstance from which the absence of the very intent which the proviso requires may properly be inferred. The principle finds support in ***CCE, Mangalore v. Pals Microsystems Ltd.***, reported in ***2011 (270) E.L.T. 305 (S.C.)***, and in ***Mopeds India Ltd. v. Collector of Central Excise***, reported in ***1991 (56) E.L.T. 241 (Tri.)***, affirmed at ***1991 (53) E.L.T. A79 (S.C.).***

24. Finally, and not without any significance on the question of intent, the Cost Audit Report disclosed excesses as well as shortages, and these offset one another so that there was no net shortage over the relevant period. A record which discloses excesses against the assessee's own interest alongside shortages is not the record of a person engaged in concealment.

25. The Revenue's reliance on ***Union of India v. Rajasthan Spinning & Weaving Mills***, reported in ***2009 (238) E.L.T. 3 (S.C.)*** is, with respect, misplaced. That decision holds that penalty under Section 11AC is attracted where, and because, the conditions of the proviso to Section 11A are satisfied. It is conditional, not free-standing. The passage relied upon in ***Neminath Fabrics (supra)*** itself records the converse proposition in the plainest terms, namely that in the absence of any element of deception or malpractice the recovery of duty can only be for a period not exceeding one year. Since the ingredients of the proviso are not made out here, Section 11AC has no application, and the penalty must fall with the demand.

26. For the reasons aforesaid, we hold that the ingredients of the proviso to Section 11A(1) of the Act are wholly absent on this record. The Department was aware of the facts constituting the basis of the demand at all material times, having attended the annual stock verification at the appellant's own invitation; the demand rested exclusively upon a statutory record which the appellant was bound to maintain and which it produced when called upon; the statutory returns required no disclosure of the matters in question; the Show Cause Notices pleaded no particulars of suppression; and the Department's inaction for sixteen months after acquiring full knowledge is irreconcilable with the intent to evade which the proviso presupposes.

27. The extended period being unavailable, the ordinary period of one year from the relevant date applies. The period in dispute is Financial Years 2001-02 and 2002-03. The Show Cause Notices dated 3rd April, 2006 are, on any reckoning of the relevant date under Section 11A(3)(ii), far beyond that period. The demand is therefore barred by limitation in its entirety. The Tribunal, in reversing the Commissioner (Appeals), applied ***Neminath Fabrics (supra)*** to a question which that decision does not decide. The Tribunal asked whether departmental knowledge could shorten the period of five years, when the question before it was whether the period of five years was available at all. That error goes to the root of its order.

28. In the result, on the first substantial question of law, we hold that the extended period of limitation under the proviso to Section 11A(1) of the Act could not be invoked on the facts of this case, and that what is relevant for the purpose of the proviso is not the absence of knowledge on the part of the Department but a positive and deliberate act of suppression on the part of the assessee, which is absent here. Question (A) is accordingly answered in the negative, in favour of the appellant and against the Revenue.

29. On the second substantial question of law, the Revenue admittedly had knowledge of the alleged shortages on 16th December, 2004 and recorded that knowledge in a spot memo, yet did nothing for nearly sixteen months and issued the Show Cause Notices only on 3rd April, 2006. The Tribunal set aside the orders of the Appellate Authority without recording any finding that the Department lacked sufficient knowledge of the facts which led to the demand. Question (B) is accordingly answered in the affirmative, in favour of the appellant and against the Revenue.

30. On the third substantial question of law, penalty under Section 11AC of the Act is attracted only where the conditions of the proviso to Section 11A(1) are satisfied. The Revenue being disentitled to invoke the extended period of limitation, it is equally disentitled to impose penalty under Section 11AC. Question (C) is accordingly answered in the negative, in favour of the appellant and against the Revenue.

31. The appeal is accordingly allowed. The order dated 22nd December, 2010 passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata is set aside and the four

Orders-in-Appeal dated 26th February, 2010 passed by the Commissioner (Appeals) are restored. The demand of Rs. 6,29,920/- confirmed by the four Orders-in-Original dated 29th August, 2007, together with interest under Section 11AB and penalty under Section 11AC of the Act, stands set aside as barred by limitation. The demand having failed *in limine* on the ground of limitation, it is unnecessary to examine the correctness of the findings on merits, upon which we express no opinion. There shall be no order as to costs.

(ARYAK DUTT, J.)

32. I Agree.

(DEBANGSU BASAK, J.)