REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6060 OF 2003

M/S. UNIWORTH TEXTILES LTD. — APPELLANT

VERSUS

COMMISSIONER OF CENTRAL EXCISE, RAIPUR — RESPONDENT

J U D G M E N T

D.K. JAIN, J.

1. This appeal under Section 130-E of the Customs Act, 1962 (for short "the Act") arises from the final Order No. 142/03-B dated 18.02.2003, passed by the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (for short "the Tribunal"). By the impugned order, the Tribunal has upheld the levy of customs duty on the import of furnace oil as also the penalty under Section 112 of the Act, rejecting the plea of the appellant that demand of the duty along with the penalty was barred by limitation.

2. The appellant, an Export Oriented Unit (for short "EOU"), is engaged in the manufacture of all wool and poly-wool worsted grey

fabrics. It was granted the status of EOU by the Government of India, Ministry of Industry, Department of Industrial Development by way of a Letter of Permission (for short "the LOP") dated 31.08.1992 as amended by letter dated 4.5.1993. The appellant applied for a license for private bonded warehouse, which was granted to it under C. No. V (Ch.51) 13-01/92/100%EOU dated 30.09.1992 by the Assistant Collector, Central Excise Division-Raipur for storing inputs, raw materials, etc. either imported duty-free by availing concessions available for 100% EOU or procured locally without payment of duty for use in manufacture of all wool, poly-wool and other fabrics.

3. For interaction with the appellant, its sister unit, Uniworth Ltd., another EOU, engaged in the generation of power from a captive power plant, obtained another LOP dated 1.11.1994. The said LOP, dated 1.11.1994, permitted usage of electricity generated by the captive power plant by both, Uniworth Ltd. and the appellant Uniworth Textiles Ltd. The appellant purchased electricity from Uniworth Ltd. under an agreement which continued till 1999.

4. Prior to January-February, 2000, the sister unit i.e. Uniworth Ltd. procured furnace oil required for running the captive power plant. This purchase of furnace oil was exempted from payment of

customs duty under Notification No. 53/97-Cus., the relevant portion of which reads as follows: -

> "**Notification No. 53/97-Cus., dated 3-6-1997**
>
> Exemption to specified goods imported for production of goods for export or for use in 100% Export-Oriented Undertakings -- New Scheme -- Notification No. 13/81-Cus. rescinded
>
> In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts goods specified in the Table below (hereinafter referred to as the goods), when imported into India, for the purpose of manufacture of articles for export out of India, or for being used in connection with the production or packaging or job work for export of goods or services out of India by hundred per cent Export Oriented units approved by the Board of Approvals for hundred per cent Export Oriented Units appointed by the notification of Government of India in the Ministry of Industry, Department of Industrial Policy and Promotion for this purpose, (hereinafter referred to as the said Board), from the whole of duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty, if any, leviable thereon under section 3 of the said Customs Tariff Act..."

Entry 11 of the said notification at the relevant time read as follows: -

> "11. Captive power plants including captive generating sets and their spares for such plants and sets as recommended by the said Board of Approvals."

5. In January-February, 2000, Uniworth Ltd. exhausted the limit of letter of credit opened by it for the duty-free import of furnace oil. It made an alternative arrangement of procuring duty free furnace oil under Notification No. 01/95 titled "Specified goods

meant for manufacture and packaging of articles in 100% EOU or manufacture or development of electronic hardware and software in EHTP or STP" dated 04.01.1995. The said notification reads as follows :-

"**Notification No. 1/95-Central Excise**

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excises and Salt Act/ 1944 (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods, specified in Annexure I to this notification (hereinafter referred to as the said goods), when brought in connection with -

(a) the manufacture and packaging of articles, or for production or packaging or job work for export of goods or services out of India into hundred percent export oriented undertaking (hereinafter referred to as the user industry); or;

XXX XXX XXX

from the **whole of,**

(i) **the duty of excise** leviable thereon under section 3 of the Central Excise Act, 1944 (1 of 1944), and

(ii) the **additional** duty **of excise** leviable thereon under sub-section (1) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957),

XXX XXX XXX

ANNEXURE I

3. Captive power plants including captive generating sets and transformers as recommended by the Development Commissioner/Designated Officer.

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3B. Spares, fuel, lubricants, consumables and accessories for captive power plants including captive generating sets and spares, consumables and accessories for transformers as approved by the Assistant Commissioner or Deputy Commissioner of Central Excise.

3C. Furnace oil required for the boilers as approved by the Assistant Commissioner of Customs or Central Excise on the recommendation of the Development Commissioner."

6. Therefore, Uniworth Ltd. informed the appellant that it would require the arrangement for running the captive power plant for its own use, and hence, would be compelled to stop the supply of electricity to the appellant. Consequently, as a temporary measure, for overcoming this difficulty, the appellant, while availing the benefit of Notification No. 53/97-Cus, procured furnace oil from Coastal Wartsila Petroleum Ltd., a Foreign Trade Zone unit. It supplied the same to Uniworth Ltd. for generation of electricity, which it continued to receive as before.

7. Since the appellant was procuring furnace oil for captive power plant of another unit, it wrote to the Development Commissioner seeking clarification that whether duty on the supply and receipt of furnace oil and electricity respectively was required to be paid. The Development Commissioner, referring to a circular dated 12.10.1999 of the Ministry of Commerce, said as follows: -

"They are procuring surplus power from their sister concern M/s. Uniworth Ltd. (Unit- 1, LOP dated 31.01.1989) under

Permission No. 248(93) dated 01.11.1994 and the unit transferred 2590.30 KL of furnace oil to M/s. Uniworth Ltd. (Unit- 1) for their captive power consumption. *No permission is required from this office for duty free import/ procurement of POL products for captive power consumption. It is further to clarify as per the Exim Policy provision, one EOU may sell/ transfer surplus power to another EOU duty free in terms of Ministry of Commerce Letter No. 1/1/98-EP dated 12.10.1999 (sic)"*

[Emphasis supplied]

The relevant portion of the Ministry of Commerce Letter No.1/98-EP is extracted below:

"2. No duty is required to paid (*sic*) on sale of surplus power from an EOU/EPZ unit to another EOU/EPZ unit. Development Commissioner of EPZ concerned would be informed in writing for such supply and proper account of consumption of raw material would be maintained by the supplying unit for calculation of NFEP."

8. Yet, the appellant received a show cause notice from the Commissioner of Customs, Raipur, demanding duty for the period during which the appellant imported furnace oil on behalf of Uniworth Ltd. It gave the following reason for the same: -

"1.1. M/s. Uniworth Ltd. (Power Division), Raipur, is engaged in the generation of power. M/s. Uniworth Textiles Ltd. and M/s. Uniworth Ltd. both are distinct companies having different LOP Central Excise Registration No. and different board of directors. They are different companies as per Companies Act and they prepare separate balance sheet…

4.2. Therefore it appears that the noticees had not received 742.5 KL of furnace oil … from M/s. Coastal Wartsila

Petroleum Ltd… in their factory at all as neither they had storing facility to store the furnace oil so procured nor they had any power plant to utilize the said furnace oil to generate electricity. They also did not have LOP from Government of India… to procure and use furnace oil to generate electricity as they did not have any power plant in their factory… Considering the above fact it is clear that the procurement of 742.5 KL of furnace oil under shipping bill, without payment of customs duty, is against the provisions of Customs Act, 1962 and rules made hereunder (sic)."

9. The show cause notice was issued on 02.08.2001, more than six months after the appellant had imported furnace oil on behalf of Uniworth Ltd. in January, 2001. This time period of more than six months is significant due to the proviso to Section 28 of the Act. The Section, at the relevant time, read as follows: -

"**28. Notice for payment of duties, interest, etc.**

(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part 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 has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or

the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "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 one year or six months or five years, as the case may be."

[Emphasis supplied]

10. The Section imposes a limitation period of six months within which the concerned authorities must commence action against an importer/assessee in case of duties not levied, short-levied or erroneously refunded. It allows the said limitation period to be read as five years only in some specific circumstances, viz. collusion, willful misstatement or suppression of facts. Since the said show-cause notice was issued after the elapse of six months, the revenue, for its action to be legal in the eyes of law, can only take refuge under the proviso to the section.

11. Both the appellate authorities, viz. the Commissioner of Customs and Central Excise (Appeals) and the Tribunal, rejected the claims of the appellant and affirmed payment of duty and penalty. They reasoned that since the appellant procured the furnace oil not for its own captive power plant, but for that of another, it could not claim exemption from payment of duty; entitlement of duty free import of fuel for its captive power plant lies with the owner of the captive power plant, and not the

consumer of electricity generated from that power plant. Little or no attention was paid to the issue of limitation, which in our opinion, is the primary question for consideration in this case. The Tribunal only made the following observations in this regard:

> "2. … He however, submitted that the demand of duty is barred by limitation as the show cause notice was issued on 02.08.2001 by demanding the duty for the period January/February 2001; that the Department was aware that the appellants do not have power plant and as such furnace oil could not have been used by them captively; that this is evident from letter dated 17.07.2001…
>
> 4… The appellants have also not brought on record any material in support of their contention that the Department was aware of the fact that the appellants did not have captive power plant. In view of this the demand cannot be held to be hit by the time limit."

Hence, the appellant is before us in this appeal.

12. We have heard both sides, Mr. R.P. Bhatt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary

default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso.

13. This Court, in ***Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay***[1], while interpreting the proviso of an analogous provision in Section 11A of The Central Excise Act, 1944, which is *pari materia* to the proviso to Section 28 discussed above, made the following observations:

> "4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. *A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact*

[1] 1995 Supp(3) SCC 462

it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

[Emphasis supplied]

14. In ***Sarabhai M. Chemicals*** *Vs.* ***Commissioner of Central Excise, Vadodara***[2], a three- judge bench of this Court, while referring to the observations extracted above, echoed the following views:

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

24. In the case of *Cosmic Dye Chemical v. Collector of Central Excise, Bombay* (1995) 6 SCC 117, this Court held

[2] (2005) 2 SCC 168

that intention to evade duty must be proved for invoking the proviso to section 11A(1) for extended period of limitation. It has been further held that intent to evade duty is built into the expression "fraud and collusion" but mis-statement and suppression is qualified by the preceding word "wilful". Therefore, it is not correct to say that there can be suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for invoking the proviso to section 11A.

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

15. In ***Anand Nishikawa Co. Ltd.*** *Vs.* ***Commissioner of Central Excise, Meerut***[3], while again referring to the observations made in ***Pushpam Pharmaceuticals Company*** (supra), this Court clarified the requirements of the proviso to Section 11- A, as follows:-

"26…This Court in the case of *Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay* (supra), while dealing with the meaning of the expression "suppression of facts" in proviso to Section 11A of the Act held that the term must be construed strictly, it does not mean any omission and the act must be deliberate and willful to evade payment of duty. The Court, further, held :-

> 'In taxation, it ("suppression of facts") can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.'

[3] (2005) 7 SCC 749

27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], 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 and 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. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11A of the Act."

16. In ***Collector of Central Excise*** *Vs.* ***H.M.M. Ltd.***[4], this Court held that mere non- disclosure of certain items assessable to duty does not tantamount to the *mala fides* elucidated in the proviso to Section 11A(1) of the Central Excise Act, 1944. It enunciated the principle in the following way: -

"The mere non-declaration of the waste/by-product in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of excise duty due on the said product. There could be, counsel contended, bonafide belief on the part of the assessee that the said waste or by-product did not attract excise duty and hence it may not have been included in their classification list. But that per se cannot go to prove that there was the intention to evade payment of duty or that the assessee was guilty of fraud, collusion, mis-conduct or suppression to attract the proviso to Section 11A(1) of the Act. There is considerable force in this contention.

[4] 1995 Supp(3)SCC 322

Therefore, if non- disclosure of certain items assessable to duty does not invite the wrath of the proviso, we fail to understand how the non-payment of duty on disclosed items, after inquiry from the concerned department meets, with that fate.

17. In fact, the Act contemplates a positive action which betrays a negative intention of willful default. The same was held by ***Easland Combines, Coimbatore*** *Vs.* ***The Collector of Central Excise, Coimbatore***[5] wherein this Court held:-

> "31.It is settled law that for invoking the extended period of limitation duty should not have been paid, short levied or short paid or erroneously refunded because of either fraud, collusion, wilful misstatement, suppression of facts or contravention of any provision or rules. *This Court has held that these ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or willful misstatement or suppression of fact or contravention of any provision is not sufficient to attract the extended period of limitation."*
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> [Emphasis supplied]

18. We are in complete agreement with the principle enunciated in the above decisions, in light of the proviso to Section 11A of the Central Excise Act, 1944. However, before extending it to the Act, we would like to point out the niceties that separate the analogous provisions of the two, an issue which received the

[5] (2003) 3 SCC 410

indulgence of this Court in ***Associated Cement Companies Ltd.*** *Vs.* ***Commissioner of Customs***[6] in the following words:-

> **"53**…Our attention was drawn to the cases of *CCE* v. *Chemphar Drugs and Liniments (1989) 2 SCC 127*, *Cosmic Dye Chemical* v. *CCE (1995) 6 SCC 117*, *Padmini Products* v. *CCE (1989) 4 SCC 275*, *T.N. Housing Board v. CCE 1995 Supp (1) SCC 50 and CCE v. H. M. M. Ltd.* (supra). In all these cases the Court was concerned with the applicability of the proviso to Section 11-A of the Central Excise Act which, like in the case of the Customs Act, contemplated the increase in the period of limitation for issuing a show-cause notice in the case of non-levy or short-levy to five years from a normal period of six months...
>
> **54.** While interpreting the said provision in each of the aforesaid cases, it was observed by this Court that for proviso to Section 11-A to be invoked, the intention to evade payment of duty must be shown. This has been clearly brought out in *Cosmic Dye Chemical case* where the Tribunal had held that so far as fraud, suppression or misstatement of facts was concerned the question of intent was immaterial. While disagreeing with the aforesaid interpretation this Court at p. 119 observed as follows: (SCC para 6)
>
> > *'6*. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'wilful' preceding the words 'misstatement or suppression of facts' which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty'. It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful.'
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> The aforesaid observations show that the words "with intent to evade payment of duty" were of utmost relevance while construing the earlier expression regarding the misstatement

[6] (2001) 4 SCC 593, at page 619

or suppression of facts contained in the proviso. Reading the proviso as a whole the Court held that intent to evade duty was essentially before the proviso could be invoked.

> ***55.*** *Though it was sought to be contended that Section 28 of the Customs Act is in pari materia with Section 11-A of the Excise Act, we find there is one material difference in the language of the two provisions and that is the words "with intent to evade payment of duty" occurring in proviso to Section 11-A of the Excise Act which are missing in Section 28(1) of the Customs Act and the proviso in particular…*
>
> ***56.*** *The proviso to Section 28 can inter alia be invoked when any duty has not been levied or has been short-levied by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter, his agent or employee. Even if both the expressions "misstatement" and "suppression of facts" are to be qualified by the word "wilful", as was done in the Cosmic Dye Chemical case while construing the proviso to Section 11-A, the making of such a wilful misstatement or suppression of facts would attract the provisions of Section 28 of the Customs Act. In each of these appeals it will have to be seen as a fact whether there has been a non-levy or short-levy and whether that has been by reason of collusion or any wilful misstatement or suppression of facts by the importer or his agent or employee."*
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> [Emphasis supplied]

19. Thus, Section 28 of the Act clearly contemplates two situations, viz. inadvertent non-payment and deliberate default. The former is canvassed in the main body of Section 28 of the Act and is met with a limitation period of six months, whereas the latter, finds abode in the proviso to the section and faces a limitation period of five years. For the operation of the proviso, the intention to deliberately default is a mandatory prerequisite.

20. This Court in ***Aban Loyd Chiles Offshore Limited and Ors.*** *Vs.* ***Commissioner of Customs, Maharashtra***[7] observed:-

> "The proviso to Section 28(1)can be invoked where the payment of duty has escaped by reason of collusion or any willful misstatement or suppression of facts. So far as "misstatement or suppression of facts" are concerned, they are qualified by the word "willful". The word "willful" preceding the words "misstatement or suppression of facts" clearly spells out that there has to be an intention on the part of the assessee to evade the duty."

21. The Revenue contended that of the three categories, the conduct of the appellant falls under the case of "willful misstatement" and pointed to the use of the word "misutilizing" in the following statement found in the order of the Commissioner of Customs, Raipur in furtherance of its claim:

> "The noticee procured 742.51 kl of furnace oil valued at Rs. 54,57,357/- without payment of customs duty by misutilizing the facility available to them under Notification No. 53/97-Cus. dt. 3.6.1997"

22. We are not persuaded to agree that this observation by the Commissioner, unfounded on any material fact or evidence, points to a finding of collusion or suppression or misstatement. The use of the word "willful" introduces a mental element and hence, requires looking into the mind of the appellant by gauging its actions, which is an indication of one's state of mind. *Black's*

[7] (2006) 6 SCC 482

Law Dictionary, Sixth Edition (pp 1599) defines "willful" in the following manner: -

> *"***Willful.** Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass…
>
> An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done…"

23. In the present case, from the evidence adduced by the appellant, one will draw an inference of *bona fide* conduct in favour of the appellant. The appellant laboured under the very doubt which forms the basis of the issue before us and hence, decided to address it to the concerned authority, the Development Commissioner, thus, in a sense offering its activities to assessment. The Development Commissioner answered in favour of the appellant and in its reply, even quoted a letter by the Ministry of Commerce in favour of an exemption the appellant was seeking, which anybody would have found satisfactory. Only on receiving this satisfactory reply did the appellant decide to claim exemption. Even if one were to accept the argument that the Development Commissioner was perhaps not the most suitable repository of the answers to the queries that the appellant laboured under, it does not take away from the *bona fide* conduct of the appellant. It still reflects the fact that the appellant

made efforts in pursuit of adherence to the law rather than its breach.

24. Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of *bona fide* conduct, by observing that "the appellants had not brought anything on record" to prove their claim of *bona fide* conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of *mala fide* lies on the shoulders of the one alleging it. This Court observed in ***Union of India** Vs. **Ashok Kumar & Ors.***[8] that "it cannot be overlooked that burden of establishing *mala fides* is very heavy on the person who alleges it. The allegations of *mala fides* are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility."

25. Moreover, this Court, through a catena of decisions, has held that the proviso to Section 28 of the Act finds application only when specific and explicit averments challenging the *fides* of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet. In ***Aban Loyd Chiles Offshore Limited and Ors.*** (supra), this Court made the following observations:

[8] (2005) 8 SCC 760

"21. This Court while interpreting Section 11-A of the Central Excise Act in Collector of Central Excise v. H.M.M. Ltd. (supra) has observed that in order to attract the proviso to Section 11-A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful misstatement of suppression of fact with intent to evade the payment of duty. It has been observed:

> *'...Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practiced or that the assessee was guilty of wilful misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.'*

It was held that the show cause notice must put the assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the assessee is put to notice the assessee would have no opportunity to meet the case of the Department. It was held:

> *...There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11-A(1) , the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless*

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the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso....”

(Emphasis supplied)

26. Hence, on account of the fact that the burden of proof of proving *mala fide* conduct under the proviso to Section 28 of the Act lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that nothing on record displays a willful default on the part of the appellant, we hold that the extended period of limitation under the said provision could not be invoked against the appellant.

27. In view of the afore-going discussion, the appeal is allowed and the decisions of the authorities below are set aside, leaving the parties to bear their own costs.

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(D.K. JAIN, J.)

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(MADAN B. LOKUR, J.)

NEW DELHI,

JANUARY 22, 2013.

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