

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 11.01.2013

+ WP (C) No. 13231/2009

**SIDDHARTH OPTICAL DISC PVT.
LTD & OTHERS**

... Petitioners

versus

UNION OF INDIA AND ANOTHER

... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr N.K. Kaul, Sr Advocate with Mr Vineet Malhotra
For the Respondents : Mr Satish Aggarwal with Mr P.K. Sharma and
Mr Santosh P. Chaurasia

AND

+ WP (C) No. 8165/2011

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LTD & ANOTHER**

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CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V.K. JAIN

JUDGMENT

BADAR DURREZ AHMED, J

1. These writ petitions raise common issues and are, therefore being disposed of by this common judgment. WP(C) 13231/2009 pertains to the period March, 2005 to March, 2009, whereas WP(C) 8165/2011 pertains to the period April, 2009 to February 2011. In WP(C) 13231/2009, the challenge is to the show cause notice dated 05.11.2009 as also the adjudication order dated 24.09.2010, whereas in WP(C) 8165/2011, the challenge is to the show cause notice dated 23.09.2011, there being no adjudication order in this case. We shall refer to the facts of WP(C) 13231/2009 for the sake of convenience.

2. Initially, WP(C) 13231/2009 had been filed challenging the show cause notice dated 05.11.2009. Subsequently, an order was passed by this court on 14.05.2010, whereby this court felt that the ends of justice would be served by directing the petitioner to file his reply to the said show cause notice dated 05.11.2009 within three weeks and, on such reply being filed, the adjudicating authority would grant an opportunity of hearing to the petitioner and / or his authorized representative. It was further directed that thereafter, the adjudicating authority shall pass a reasoned order deciding as

to whether to confirm the allegations mentioned in the show cause notice or to reject the same. It was also directed that the adjudication order-in-original, which may be passed, shall not be given effect to till further orders from this court. Pursuant thereto, the petitioner filed its reply on 03.06.2010. This was followed by a personal hearing and, ultimately, by the adjudication order dated 24.09.2010. Thereafter, the petitioner sought permission of this court, which was granted, to amend the writ petition. The amended writ petition challenges both the show cause notice dated 05.11.2009 and adjudication order dated 24.09.2010.

3. The case against the petitioner is that during the process of manufacturing of pre-recorded audio compact discs, video compact discs and DVDs, *“first blank CDs/DVDs are manufactured and thereafter data is transferred and recorded on the said blank CDs/VCDs/DVDs”*. It is also alleged that as the petitioner was availing the benefit of exemption from payment of Central Excise Duty under Notification No.6/2006-CE dated 01.03.2006 in respect of pre-recorded audio CDs/DVDs/VCDs, Central Excise Duty at the appropriate rate was chargeable on the blank pre-recorded audio CDs/VCDs/DVDs which allegedly came into existence at the intermediate stage during the process of manufacturing of pre-recorded

audio CDs/VCDs/DVDs. It is also the case against the petitioner that as it had suppressed these facts allegedly with a view to evade payment of appropriate Central Excise Duty, the extended period of limitation was invocable and that the petitioner was also liable for penalties.

4. Briefly stated, the case of the petitioner is that it does not manufacture blank audio CDs/VCDs/DVDs, whether, as a final product or as an intermediate product. Therefore, there is no question of levying any Excise Duty on a non-existent product. It is also the case of the petitioner that the revenue has not discharged its burden by bringing any material on record to show that the petitioner's factory was even capable of manufacturing blank audio CDs/VCDs/DVDs or that it had ever done so. On the contrary, the entire process of manufacture has been explained by the petitioner, stage by stage, with photographs, and expert opinions have also been placed on record which have not been controverted by the revenue. When no blank audio CD/VCD/DVD comes into existence during the manufacturing process of pre-recorded audio CDs/VCDs/DVDs, there is no question of there being any liability towards Central Excise Duty on such imagined blank audio CDs/VCDs/DVDs.

5. Before examining the rival contentions, it would be necessary to place on record some facts. The petitioner had pointed out that in the year 2007, some officers of the Central Excise Department had threatened the petitioner of implicating it in some false cases with a view to extract a bribe from the petitioner. The petitioner did not succumb to the demand for bribe, but filed a complaint with the Central Bureau of Investigation (CBI), as a result of which, the CBI caught two officers red-handed and arrested them on the charges of demanding a bribe from the petitioner. Thereafter, the Central Excise officers of Delhi-II Commissionerate, Anti-Evasion Branch conducted searches on the two factory premises of the petitioner on 11.06.2009. The search resulted in seizure of records and seizure of several thousand pre-recorded audio CDs/VCDs/DVDs and MP3s valued at Rs 83,750/- vide *panchnama* dated 11.06.2009. The petitioner filed a criminal writ petition being WP(Crl) 795/2009 before this court, *inter alia*, seeking quashing of the *panchnama* and summons both dated 11.06.2009. That petition is pending.

6. Shortly thereafter, that is, on 05.11.2009, the impugned show cause notice was issued to the petitioner requiring it to show cause as to why:

- “(i) Central Excise duty amounting to Rs.10,16,09,833/- alongwith Ed. Cess amounting to Rs.20,32,197/- and H.S. Ex. Cess amounting to Rs.5,57,336/- evaded during the period April, 2005 to March, 2009 as detailed in the table given above, should not be demanded and recovered from them by invoking extended period of five years under proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944 by manufacturing excisable goods i.e. Blank CDs/DVDs which arise at an intermediate stage and clearing the same for captive consumption without payment of Central Excise duty since the final product is exempt from payment of Central Excise duty vide Notification No. 6/2006-CE.
- (ii) Interest should also not be demanded and recovered from them on the duty amount evaded, under the provisions of Section 11 AB of the Central Excise Act, 1944.
- (iii) Finished goods i.e. 14300 Nos. of Pre Recorded Audio CDs, Video CDs, MP3s and DVDs valued at ₹. 83,750/- which were seized on 11.6.2009 by the Central Excise officers should not be confiscated under Rule 25 of Central Excise Rules, 2002 since duty had not been paid at intermediate stage of the said finished goods.
- (iv) Penalty should not be imposed on M/s Siddharth Optical Discs (P) Ltd. under Section 11 AC of the Central Excise Act, 1944 and under Rule 25 of the Central Excise Rules, 2002 for the various acts of omission and commission as discussed above.
- (v) Penalty should not be imposed on Sh. Surender Wadhwa under Rule 26 of the Central Excise Rules, 2002 for his being knowingly concerned with the fraudulent evasion of Central Excise duty as detailed above.
19. Sh. Jose Joseph, Technical Consultant of M/s Siddharth Optical Discs (P) Ltd., r/o 703, Sahara Apartments,

Dwarka, New Delhi is also hereby called upon to show cause to the Commissioner of Central Excise, Delhi-II, CR Building, ITO, IP Estate, New Delhi as to why Penalty should not be imposed on him under Rule 26 of the Central Excise Rules, 2002 for his being knowingly concerned with the fraudulent evasion of Central Excise duty as detailed above.”

7. It is the case of the petitioner that the impugned show cause notice was by way of a vendetta against the petitioner and that it was a direct result of the petitioner having made a complaint of bribery against the two officials of the respondents.

8. In the impugned show cause notice dated 05.11.2009, the voluntary statement of Mr Jose Joseph, Technical Consultant, whereby he explained the manufacturing process, was noticed. As per the statement of Mr Jose Joseph, the manufacturing process was an integrated one wherein the petitioner manufactured pre-recorded audio CDs/VCDs/DVDs. It was further stated that polycarbonate was the basic raw material which was de-humidified in a drier and then fed into the moulding machine which itself was loaded with a nickel stamper containing the data. In the process of moulding, the data on the stamper was transferred on to the discs as they were moulded in the form of small pits and lands (Bumps). Thereafter, the

said discs are fitted into the finishing line automatically and the discs are coated (sputtered) with a semi-transparent coating of reflective layer of aluminium and again coated with a protective layer of lacquer. Thereafter, the discs are checked for optical defects. Thereafter, the discs are labelled and packed in cartons and are despatched to customers. It was also stated that the discs were manufactured against specific orders and agreements and were supplied to customers, who are normally the copyright holders of various titles of films / songs etc.

9. The impugned show cause notice dated 05.11.2009 also noted that the statement of Mr Surender Wadhwa, Managing Director of the petitioner, was also recorded on 22.07.2009, wherein he, *inter alia*, stated that he was looking after the affairs of the petitioner and that the petitioner had been manufacturing audio CDs/VCDs and CD ROMs of an educational nature for some time and that in April 2007, the petitioner had started manufacturing DVDs also. It was further stated that earlier the petitioner was paying Central Excise duty on VCDs and in the year 2004, VCDs were exempted as a result of which the petitioner surrendered its Central Excise Licence. Thereafter, the petitioner continued manufacturing of audio CDs/VCDs/DVDs and CD ROMs of educational nature.

10. The main allegation in the show cause notice was as under:-

“12. The facts on record of the present case satisfies all the conditions of “excisable goods” for the goods in question since blank CDs/DVDs are a movable and marketable commodity and is capable of being sold in the open market and are separately classified in the Central Excise Tariff Act, 1985. The party never disclosed the fact of manufacturing blank CDs/DVDs at intermediate stage and thus deliberately and intentionally suppressed this vital fact from the Department with an intention to evade duty and thus extended period for demand of Central Excise duty is also to be invoked in the present case.”

11. The allegations in detail against the petitioner were as under:-

“14. On the basis of the above, the following facts emerge:

- (i) M/s Siddharth Optical Discs (P) Ltd. having their manufacturing Units at C-3/12, Mayapuri Indl. Area Phase-II, New Delhi and at F-133, Mayapuri Industrial Area, Phase-II, New Delhi are engaged in manufacture of pre-recorded VCDs/Audio CDs and DVDs and is not registered with Central Excise Department and thus not paying any Central Excise duty.
- (ii) The party is claiming benefit of exemption Notification No.6/2006-CE wherein recorded VCDs/Audio CDs and DVDs are exempted.
- (iii) Blank CDs/DVDs arise at intermediate stage during the course of integrated manufacturing process. Recording of data cannot be done on granules and obviously blank CD/DVD comes into

existence during the course of manufacture at any point of time. However, since the process of manufacture of the petitioner is an integrated process wherein the raw material is injected into the machine and only the final product i.e. pre-recorded VCDs/Audio CDs and DVDs come into being in existence and thus it can be reasonably concluded that blank CDs/DVDs also get manufactured at intermediate stage even though they may not come into existence separately. Sh. Jose Joseph, Technical Consultant for the party has also in his voluntary statement recorded on the spot and ratified by Sh. Surender Wadhwa, Managing Director of M/s Siddharth Optical Discs (P) Ltd., stated, inter-alia that “the moulding machine was loaded with nickel stamper containing the data to be produced and the data from the stamper was transferred to the Discs in the form of small pits and lands and given to CD (1.2mm) finishing line automatically”. Therefore, it can be rightly concluded that first a blank Disc is generated and thereafter the said data is transferred thereupon.

- (iv) Blank CDs/DVDs are a distinct commodity and separately classifiable and are also dutiable under the Central Excise Tariff Act, 1985 and there is no exemption thereon. In terms of Notification No.67-95-CE dated 16.3.1995, in case the final product is exempted from payment of Central Excise duty, then duty ought to be paid at intermediate stage on clearances of blank CDs which are consumed captively by the party but M/s

Siddharth Optical Discs (P) Ltd. are not paying any Central Excise duty at any stage.

- (v) In spite of clearance running into several crores of Rupees, the party did not obtain Central Excise Registration and continued its clearances of dutiable goods without payment of Central Excise duty.
- (vi) The party also did not issue any invoice in respect of captively consumed blank CDs/DVDs and thus the clearances were effected without issue of any invoice as well.
- (vii) The party has adopted a modus-operandi by manufacturing excisable goods i.e. blank CDs and clearing the same without payment of Central Excise duty and without issue of any invoice as detailed in above paras. The party has suppressed this vital and material fact of manufacturing blank CDs at intermediate stage, which are excisable goods, from the Department. This suppression of fact and mis-statement was done intentionally in order to evade payment of Central Excise duty and thus the party have contravened various provisions of Central Excise Act, 1944 and the Rules made thereunder. Therefore, the extended period of limitation as prescribed in terms of the first proviso to sub-section (i) of Section 11A of the Central Excise Act, 1944 is required to be invoked in this case.”

12. From the said show cause notice dated 05.11.2009, it is clear that the case against the petitioner is that the petitioner manufactures blank CDs/VCDs/DVDs at an intermediate stage and that the said blank CDs/VCDs are exigible to Central Excise duty. However, what is of importance is that the show cause notice recognizes the fact that the blank CDs/VCDs/DVDs do not come into existence separately. This is clear from the following expression used in the show cause notice itself:-

“And thus, it can be reasonably concluded that blank CDs/DVDs also get manufacture at intermediate stage even though they may not come into existence separately.”

13. It is on this basis that the show cause notice alleges that – therefore it can be rightly concluded that “first the blank disc is generated and thereafter the said data is transferred thereupon”. On this premise, it is alleged that as blank CDs/DVDs are a distinct commodity and separately classifiable and are exigible to duty and there is no exemption in respect thereof, the petitioner ought to have paid duty on the blank CDs manufactured by it.

14. The petitioner submitted a detailed reply on 03.06.2010 after the filing of the writ petition, as indicated above. In the reply, the petitioner set

out the detailed process of manufacture of pre-recorded audio CDs/VCDs/DVDs and categorically stated that it does not manufacture any blank CDs/DVDs. It also stated that its machines are not capable of manufacturing blank CDs/DVDs. The petitioner also took the point that the show cause notice had been issued purely as vendetta on the part of the respondents because of the fact that the petitioner had got two of the respondents' officers caught in a bribery case.

15. We have already indicated above that during the pendency of the writ petition, this court had directed the petitioner to file a reply and the respondents to pass an adjudication order, though the same would not be given effect to till further orders from this court. Consequently, the adjudication order dated 24.09.2010, which is also impugned in WP(C) 13231/2009, was passed. The said adjudication order sets out the entire show cause notice as also the contentions of the petitioner in the reply dated 03.06.2010. It also records the fact that by a letter dated 06.08.2010, the learned counsel for the petitioner had forwarded to the Commissioner, Central Excise, Delhi-II, i.e., the adjudicating officer, a copy of an expert opinion from M/s Truth Labs. The said report has been extensively quoted in the impugned order dated 24.09.2010. In the said opinion of M/s Truth

Labs, it has been stated that the pre-recorded CD manufacturing facilities of the petitioner have six stages in the process of manufacture and they are – (a) Moulding process; (b) Stamping with a nickel stamper; (c) Aluminium coating; (d) Lacquer coating; (e) Drying under an UV Lamp; and (f) Collection of the final product for label printing. The expert opinion specifically mentions that the manufacturing lines of the petitioner are capable of producing pre-recorded CDs or DVDs only. It also records that the existing machinery of the petitioner was unfit for making blank CDs either “simultaneously or alternatively”. Subsequently, the petitioner submitted a letter to the said Commissioner on 11.08.2010, whereby a specific clarification from M/s Truth Labs was forwarded. The clarification categorically stated that the manufacturing facilities examined at the petitioners’ premises cannot manufacture unrecorded blank CDs at any intermediate stage during the course of manufacture or recorded VCDs and DVDs. It was also clarified that the production of blank CDs was not a pre-requisite for the manufacture of pre-recorded CDs/VCDs and DVDs in the manufacturing facility of the petitioner. Even during the course of personal hearing, the learned counsel appearing on behalf of the petitioner categorically stated that the petitioner did not have the facility to

manufacture blank CDs/DVDs. The Commissioner formulated two issues which arose for consideration. Those two issues were as under:-

- “A. Whether blank CDs (Compact Disc) come into the existence in the process of manufacturing of pre-recorded CDs and DVDs and whether the machinery installed and operated by the notice is capable of manufacturing blank CDs/DVDs?
- B. Whether the demand of the Central Excise duty is time barred ?”

16. Both the questions were decided against the petitioner and in favour of the revenue. The conclusions of the Commissioner in the adjudication order on the first question were as under:-

“35. In this background I have carefully considered the matter. I find the argument that they do not manufacture blank CDs is misplaced and misconstrued. This is because production and clearance of blank CDs as an independent visible physical product is not the issue in hand. The departmental case is that in the integrated process of manufacture of recorded CDs/DVDs, at the intermediate stage blank CDs/DVDs are manufactured and captively consumed. The blank CDs and DVDs are distinct excisable commodity chargeable to Central Excise duty. The blank CDs/DVDs that get manufactured in the process are captively used for recording the data/songs. The emphasis of the noticee that for charging Central Excise duty it is necessary that first blank CDs/DVDs must be manufactured and same need to be physically cleared. In the manufacturing process explained by the Technical Consultant it has been clearly mentioned that Polycarbonate Granules are the basic

raw material for manufacturing CDs. In the composite integrated manufacturing assembly line the Optical Grade Polycarbonate Granules are fed in the hopper which travel to moulding unit of the machines for liquification. The liquefied polycarbonate is injected to the cavity of the moulds that create compact disc which cools and solidifies. Pressed discs after cooling are captively used for data transfer from the stamper. After the data is transferred from stamper to the disc the next stage is the metalizing process. In this the active surface of the disc is metalized by process known as sputtering in order that the laser can read the pits. The metallic layer is covered by lacquer cured by UV light producing a hard protecting surface to protect the CD and the information contained therein from scratching, bending etc. The CD is then sent for printing.

Even the expert opinion relied upon by the notice nowhere specifically and categorically states that blank CDs do not get manufactured in the process. In its report under the heading 'Examination' it states that lines 8 and 9 were found to be multipurpose units having capacity to manufacture either CDs or DVDs. Under the heading 'Reasons' it is stated that

"To manufacture a blank disc following additional accessories are required.

Climate Control Unit to maintain the temperature and pressure.

1. *Buffer Unit to accommodate large number of transparent discs and multiple CD-R dye coating station etc.*

We could not observe these facilities inbuilt in the manufacturing lines during our inspection in the said premises.

36. A wholesome reading of expert opinion and the actual manufacturing process explained by the Technical Consultant would show that in the integrated composite manufacturing

process first blank CDs/DVDs are manufactured out of the basic raw material of Polycarbonate Granules and said CDs are captively used in the integrated process for recording the data by way of transferring the data from stamper to the discs. It is not necessary that each of the process must progress in a linear fashion and at each stage, the process must be physically distinguished and observed. In the composite integrated manufacturing facility the process take place simultaneously. Therefore to argue that department should produce blank CD to support allegation appears to be out of place with the technology. Looking from other side it is evident that the songs/ or other readable data/ material is recorded on CDs/DVDs only. Can there be an argument that the songs etc. are not recorded on the CDs/DVDs. The obvious answer is big no. The data on stamper is transferred on the CDs/DVDs that come into existence during the manufacturing process. The process of manufacturing of CDs/DVDs and transfer of the data on the discs take place simultaneously without any distinguishable and observable time gap and physical activity in the composite integrated process. I also note that the expert opinion relied upon by the notice nowhere denies that CDs do not come into existence. In other words the transfer of data from Stamper takes place on the discs only and unless such blank discs come into existence at the intermediate stage during the integrated manufacturing process, no such recorded CDs can be manufactured. The very fact that recorded CDs are cleared as final product, it shows that in the composite integrated manufacturing facility the blank CDs get manufactured and same are captively used for recording of the data. The case laws cited by the notice are distinguishable on facts and are not applicable to the very unique and distinct set of facts involved in the present case. In the light of the aforesaid discussions and findings, I reject the contentions raised by the notice and hold that in the composite integrated manufacturing machinery installed by the assessee during the process of manufacturing of recorded CDs/DVDs, blank CDs came into existence. Since the final finisher recorded ACDs/ VCDs/DVDs/MP3 are exempted from payment of Central

Excise duty because of Notification No. 6/2006-CE dated 01.03.2006, the blank CDs that emerge at the intermediate stage prior to the recording are chargeable to Central Excise duty.”

17. On the issue of time-bar also, the Commissioner held against the petitioner. He ultimately passed the following order:-

“ORDER

- (i) I, confirm the Central Excise duty amounting to Rs. 10,16,09,833/- (Rs. Ten Crores Sixteen Lacs Nine Thousand Eight Hundred and Thirty Three only) along with Ed. Cess amounting to Rs.20,32,197/- (Rs. Twenty Lacs Thirty Two Thousand One Hundred and Ninty Seven only) and H.Ed. Cess amounting to Rs.5,57,336/- (Rs. Five Lacs Fifty Seven Thousand Three Hundred and Thirty Six only) evaded during the period April, 2005 to March, 2009 as detailed in the table given above, may be demanded and recovered from them by invoking extended period of five years under proviso to sub-section(1) of the Central Excise Act, 1944 by manufacturing excisable goods i.e. Blank CDs/DVDs which arise at an intermediate stage and clearing the same for captive consumption without payment of Central Excise duty since the final product is exempt from payment of Central Excise duty vide Notification No. 6/2006-CE.
- (ii) I, order interest be demanded and recovered from them on the duty amount evaded, under the provisions of Section 11 AB of the Central Excise Act, 1944.
- (iii) I, order for confiscation of the finished goods i.e. 14300 Nos. of Pre Recorded Audio CDs, Video CDs, MP3s and DVDs valued at Rs. 83,750/- (Rs. Eighty Three Thousand Seven Hundred and Fifty only) which were seized on 11.6.2009 by the Central Excise

officers under Rule-25 of Central Excise Rules, 2002 since duty had not been paid at intermediate stage of the said finished goods, however I given an option to redeem the goods after payment Redemption Fine of Rs. 10,000/- (Rs. Ten Thousands only) and the same shall be cleared on payment of appropriate Central Excise duty.

- (iv) I impose penalty of Rs. 10,16,09,833/- (Rs. Ten Crores Sixteen Lacs Nine Thousand Eight Hundred and Thirty Three only) on M/s Siddharth Optical Discs (P) Ltd. under Section 11AC of the Central Excise Act, 1944 and under Rule 25 of the Central Excise Rules, 2002 for the various acts of omission and commission as discussed above.
- (v) I impose penalty of Rs. 25,00,000/- (Rs. Twenty Five Lacs only) on Sh. Surender Wadhwa under Rule 26 of the Central Excise Rules, 2002 for his being knowingly concerned with the fraudulent evasion of Central Excise duty as detailed above.
- (vi) I do not impose any penalty on Shri Jose Joseph, the technical consultant of M/s Siddharth Optical Discs Pvt. Ltd.”

18. From the above, it is clear that the key question is whether the petitioner manufactures blank CDs/DVDs as an intermediate product or not? The petitioner has produced evidence to show that it does not manufacture any blank CDs or DVDs. The learned counsel for the petitioner submitted that no blank CDs / DVDs come into existence which are capable of sale to a consumer. It was submitted by the learned counsel for the petitioner that before a particular product is exigible to Central

Excise duty, it must pass the twin tests of manufacture and marketability. It was submitted that in the present case, both the tests were not satisfied. This is so because there was no manufacture of blank CDs/DVDs and, therefore, the question of marketability did even not arise. Reliance was placed by the learned counsel for the petitioner on the following decisions for the proposition that the twin tests of manufacture and marketability should be satisfied before any “goods” could be subjected to Central Excise duty:-

- 1) **Union Carbide India Ltd v. Union of India and Others: 1986 (2) SCC 547;**
- 2) **Board of Trustees v. Collector of Central Excise, A.P.: 2007 (216) E.L.T. 513(S.C.);**
- 3) **Bata India Limited v. Commissioner of Central Excise, New Delhi: 2010 (5) SCC 490.**

19. The learned counsel for the petitioner also submitted that a writ petition was maintainable for quashing of a show cause notice as also of an adjudication order and that the rule of exhaustion of alternative remedies was not a compulsion, but only a matter of prudence and, in deserving cases, the High Court ought to exercise its power under Article 226/227 of the Constitution of India for setting aside show cause notices as also adjudication orders. In support of this proposition, the learned counsel for

the petitioner placed reliance on the following decisions of the Supreme Court:-

- 1) **Calcutta Discount Company Limited v. Income-tax Officer, Companies District, I and Another:** 1961 (2) SCR 241;
- 2) **Union of India and Another v. M/s Brij Fertilizers Pvt. Ltd and Others:** 1993 (3) SCC 564;
- 3) **HarbanslalSahnia and Another v. Indian Oil Corporation Ltd. and Others:** 2003 (2) SCC 107; and
- 4) **Siemens Ltd v. State of Maharashtra & Others:** 2006 (12) SCC 33.

20. The learned counsel for the respondents submitted that the petitioner did, in fact, manufacture blank CDs/DVDs. It was also submitted that, in any event, now that there is an adjudication order, the petitioner has the remedy of appeal under the Central Excise Act, 1944. The petitioner ought to exhaust its alternative remedy. Therefore, this court ought not to entertain this writ petition. The learned counsel for the respondents supported the issuance of the show cause notice as also the adjudication order dated 24.09.2010. For the arguments with regard to the petitioner being relegated to pursue the alternative remedy of appeal, the learned counsel for the respondents placed reliance on the following decisions of the Supreme Court:-

- 1) **ITC Limited and Another v. Union of India & Others: 1998 (8) SCC 610;**
- 2) **United Bank of India v. Satyawati Tondon and Others: 2010 (8) SCC 110;**
- 3) **Union of India v. Zalcon Electronics: 2010 (255) ELT 490 (SC);**
- 4) **Kanaiyalal Lalchand Sachdev and Others v. State of Maharashtra and Others: 2011 (2) SCC 782.**

21. Before we examine the factual position on the basis of material on record, it would be appropriate for us to consider the decisions cited by the learned counsel for the parties. First, we shall consider the decisions cited by the learned counsel for the petitioner. In *Union Carbide (supra)*, the Supreme Court considered the question as to whether aluminium cans, which ultimately constituted torch bodies, could be regarded as “goods” manufactured or produced. The Supreme Court held that before articles are recognized as “goods” for the purposes of excise duty, they must be capable of sale to a consumer and if the articles are not marketable, then they cannot be regarded as “goods”. The Supreme Court, in this context, observed as under:-

“5. The only contention urged by the appellant before us is that the aluminium cans produced by the appellant cannot be described as "goods" for the purposes of excise duty inasmuch as they are not marketable and are prepared entirely by the appellant for the flashlights manufactured by it.

6. It does seem to us that in order to attract excise duty the article manufactured must be capable of sale to a consumer. Entry 84 of List I of Schedule VII to the Constitution specifically speaks of "duties of excise on tobacco and other goods manufactured or produced in India...", and it is now well accepted that excise duty is an indirect tax, in which the burden of the imposition is passed on to the ultimate consumer. In that context, the expression "goods manufactured or produced" must refer to articles which are capable of being sold to a consumer. In *Union of India v. Delhi Cloth & General Mills*: AIR 1963 SC 791, this Court considered the meaning of the expression "goods" for the purposes of the Central Excises and Salt Act, 1944 and observed that "to become 'goods' an article must be something which can ordinarily come to the market to be brought and sold", a definition which was reiterated by this Court in *South Bihar Sugar Mills Ltd., Etc. v. Union of India and Ors.*: AIR 1968 SC 922."

22. In the facts of the case before it, the Supreme Court also noted that not a single instance had been provided by the respondents to demonstrate that the aluminium cans produced by the appellant therein had a market and though the aluminium cans produced by the appellant therein were subsequently developed by it into a complete component for being employed as flashlight cases, the aluminium cans by themselves were not "goods" as they were not marketable.

23. The Supreme Court in *Board of Trustees (supra)*, noted that in order to constitute "goods", twin tests have to be satisfied, namely, the process

constituting manufacture and, secondly, marketability. The Supreme Court also observed that if the “goods” are not capable of being sold, then the test of marketability is not fulfilled. The Supreme Court also held that the burden is on the department to prove whether there exists the process which constitutes manufacture and, secondly, whether the product is marketable.

24. In ***Bata India*** (*supra*), the Supreme Court was considering the question as to whether unvulcanised sandwiched fabric assembly produced in the assessee’s factory and captively consumed by it could be termed as “goods”. The Supreme Court observed in the facts of the case that the product in question was used as an intermediate product and went into the making of a component for the final product. But, the burden to show that the product in question was marketed or was capable of being bought or sold in the market so as to attract Central Excise duty was entirely on the revenue. The Supreme Court also observed that in the case before it, the revenue had not produced any material to show that the product in question was either being marketed or capable of being marketed, but only expressed an opinion unsupported by relevant materials and, therefore, the same could not be held to be “goods”. The Supreme Court reiterated that in order to establish that the “goods” are liable to duty, two tests have to be satisfied –

(a) manufacture; and (b) marketability. The Supreme Court also observed that marketability cannot be established by mere stability of the product and that something more would have to be shown to establish that the products are known in the market as commercial products. The Supreme Court also observed as under:-

“18. Revenue in this case has not succeeded in establishing that the product in question was either marketed or was capable of being marketed. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. No evidence has been produced by the Revenue to show the product unvulcanised sandwiched fabric as such is capable of being marketed, without further processing. The question is not whether there is an hypothetical possibility of a purchase and sale of the commodity but whether there is sufficient proof that the product is commercially known. The mere fact that the product in question was entrusted outside for some job work such as stitching is not an indication to show that the product is commercially distinct or marketable product. Without proof of marketability the intermediate product would not be goods much less excisable goods. Such a product is excisable only if it is a complete product having commercial identity capable of being sold to a consumer which has to be established by the Revenue.”

25. From the above extract, it is clear that before a product can be classified as “goods”, it must be shown to be a complete product, having a

commercial identity and capable of being sold to a consumer. And, all this must be established by the revenue.

26. On the basis of the aforesaid decisions of the Supreme Court, it is apparent that before any article can be considered to be “goods” within the Central Excise regime, the twin tests of manufacture and marketability would have to be satisfied. The burden of fulfilling the tests is on the revenue. The revenue has to establish that the article has been manufactured and it has to establish that the said article, which has been manufactured is marketable or, in other words, capable of being bought or sold in the market.

27. We shall have to examine the facts of the case in the light of this position in law. We have already noticed above that the petitioner has categorically stated that it does not manufacture any blank CD/DVD. It has supported this contention by an expert opinion of M/s Truth Labs. There is nothing on the part of the revenue to show that the petitioner does, in fact, manufacture blank CDs/DVDs. It was incumbent upon the revenue to have discharged its burden of establishing that the petitioner, in fact, manufactures blank CDs and DVDs. Mere surmises and conjectures on the

part of the revenue would not lead to the revenue discharging this burden. There must be some material on record on which the revenue can rest its opinion. We find that in the present case, there is no such material. On the contrary, in the show cause notice, it is admitted that the CDs/DVDs do not come into existence separately. The same position has been accepted in the adjudication order dated 24.09.2010. In our view, the conclusion of the Commissioner in the adjudication order that the petitioner manufactures blank CDs/DVDs is merely based on his own *ipse dixit* and is not supported by any material on record. The Commissioner has wrongly held that liquefied polycarbonate is injected to the cavity of the moulds that create component discs which cool and solidify and the pressed discs, after cooling, are captively used for data transfer from the stamper. This is not borne out by the facts and the manufacturing process. The stamping and the moulding takes place simultaneously. It is not as if, first, a blank disc is created and then it is stamped. The process is simultaneous. While liquefied polycarbonate solidifies, it is imprinted with data by the stamper. Therefore, at no stage does a blank CD/DVD come into existence. This will be clear from the process of manufacture stage by stage with photographs as under:-

“CD Manufacturing Process.

STAGE-1

Plastic Granules are fed into the machine.



STAGE-2

A Stamper containing Audio / Video data is fitted into the mould cavity of the machine. The Stamper has the Audio / Video data in the form of Pits and lands (bumps) on them along with the title name of the VCDs/DVDS and Audio CDs to be produced.





STAGE-3

The mould closes in and liquified plastic is automatically injected into the cavity of the mould. The mould cavity and the pits on the metal Stamper are filled with the molten plastic.



Then the mould is allowed to cool down for about 2 to 3 seconds and a transparent plastic disc of 1.2 mm thick, having data in the form of lands (bumps) and pits is produced.



Then the mould cavity opens and the transparent disc with data is taken out by an automated process through a robot. The Pits and bumps on the disc are exactly similar to the Pits and Bumps on the Stamper.



A moulded transparent plastic recorded VCD / DVD or Audio CD comes into existence.



STAGE-4

To make the said disc readable, a reflective layer coating of aluminium is done on the disc.

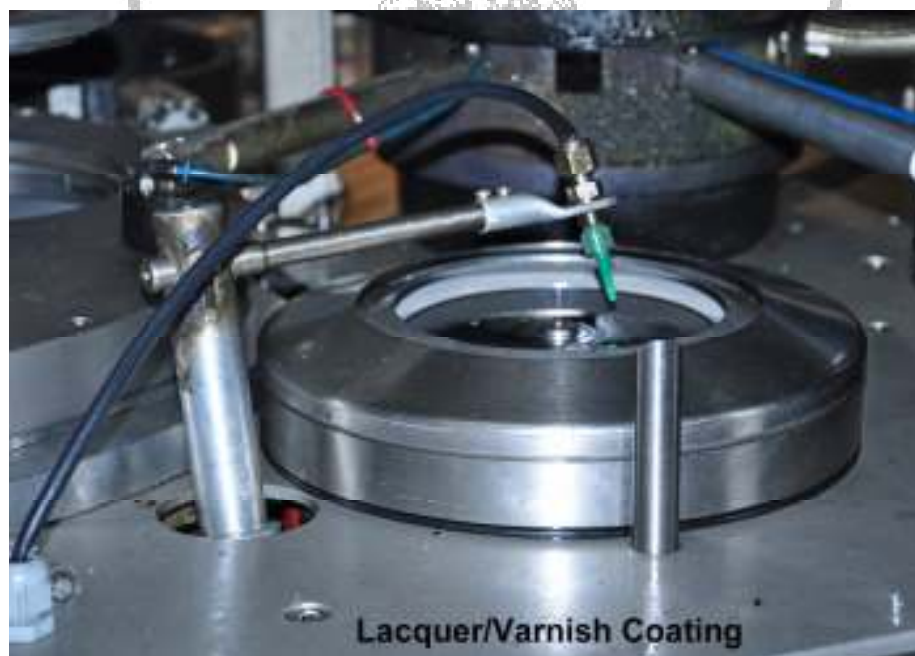
It is only after the said coating that the said disc can be played, as it is only because of this coating that the lens in the player makes the data on the CD/DVD readable.





STAGE-5

To protect the disc from scratches and to increase its life a lacquer / varnish coating is done on the said disc. The said coating is not essential and is only done to increase the life of the disc.



STAGE-6

After coating the disc is dried under an ultra-violet lamp.

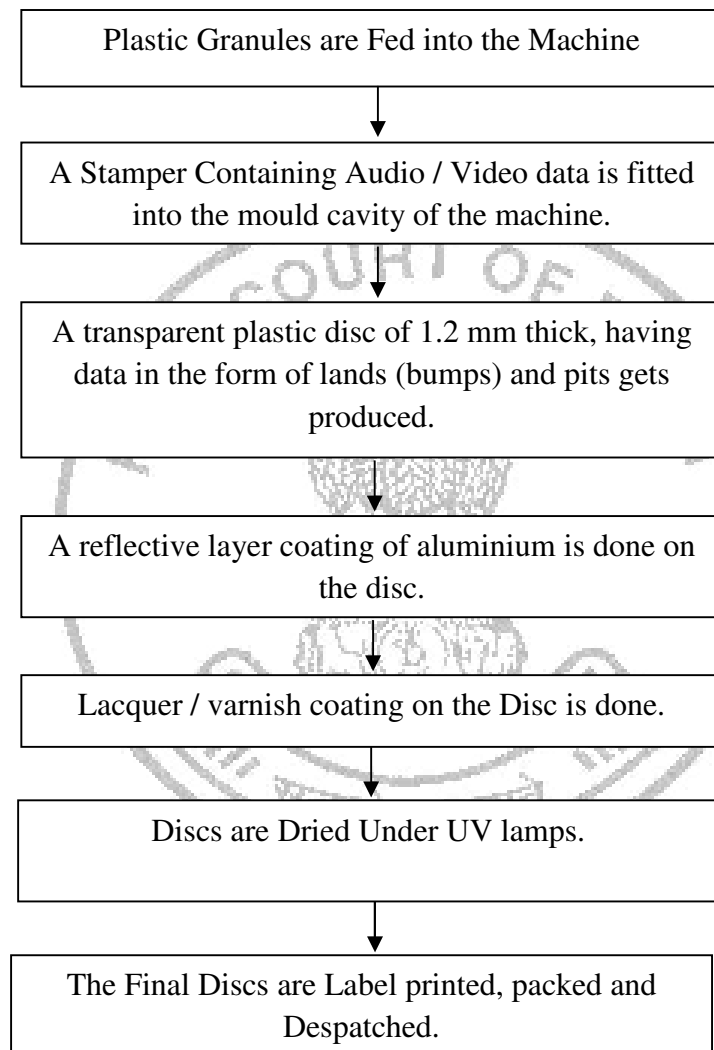


STAGE-7

The Final CDs are label printed according to the title and then they are, packed and dispatched.



28. The CD manufacturing flow chart is as under:-



29. From the above process of manufacture, which has been recounted stage by stage, it is absolutely clear that at no point of time in the

manufacturing process employed by the petitioner, does a blank CD/DVD come into existence. The very first test of manufacture is not satisfied in the present case. When no such product comes into existence at all, then, obviously, the second test of marketability cannot also be satisfied. Consequently, no excise duty can be demanded from the petitioner for blank CDs/DVDs. The entire show cause notice as also the adjudication order is, therefore, without any substance.

30. We now come to examine the legal position with regard to the exercise of writ jurisdiction in a matter such as this. The learned counsel for the respondents had placed reliance on *ITC Limited (supra)* to submit that the writ petition ought to be dismissed as the petitioner has an adequate alternative remedy by way of an appeal. Reliance had also been placed on *United Bank of India (supra)* and, particularly, on the following observations of the Supreme Court:-

“43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in

mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.”

31. But, we must not forget the emphasis on the words, “ordinarily” and “effective” which are employed in the above extract. We feel that in the present case, the show cause notice as also the adjudication order are wholly without any basis. And, we say this on the basis of the material on record to which we have already alluded above. Moreover, we also cannot ignore what is stated in the Supreme Court decision in *United Bank of India* (*supra*) itself that these are only rules of self-restraint.

32. *Zalcon Electronics* (*supra*) was also relied upon by the learned counsel for the appellant to submit that where an adjudication takes place, the assessee should carry the matter by way of an appeal and should not approach the High Court by way of a writ petition. In that case also, the Supreme Court, in the facts and circumstances of that case, directed that the assessee should have exhausted the statutory remedy and that the High

Court should not have interfered with the adjudication order. This, however, does not mean that in no case, can the High Court interfere with an adjudication order even where the situation warrants its interference as in the present case.

33. Lastly, the learned counsel for the respondent had placed reliance on ***Kanaiyalal Lalchand***(*supra*) and, particularly, on paragraphs 23, 24 and 25 which read as under:-

“23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the Appellants under Section 17 of the Act. It is well-settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See: ***SadhanaLodh v. National Insurance Co. Ltd. and Anr.***:(2003) 3 SCC 524; ***Surya DevRai v. Ram ChanderRai and Ors.***: (2003) 6 SCC 675;***State Bank of India v. Allied Chemical Laboratories and Anr.***: (2006) 9 SCC 252.

24. In ***CityandIndustrialDevelopment Corporation v. Dosu Aardeshir Bhiwandiwalla and Ors.***: (2009) 1 SCC 168,this Court had observed that:

‘The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

- (a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;
- (b) the petition reveals all material facts;
- (c) the Petitioner has any alternative or effective remedy for the resolution of the dispute;
- (d) person invoking the jurisdiction is guilty of unexplained delay and laches;
- (e) ex facie barred by any laws of limitation;
- (f) grant of relief is against public policy or barred by any valid law; and host of other factors.’

25. In the instant case, apart from the fact that admittedly certain disputed questions of fact viz. non-receipt of notice under Section 13(2) of the Act, non-communication of the order of the Chief Judicial Magistrate etc. are involved, an efficacious statutory remedy of appeal under Section 17 of the Act was available to the Appellants, who ultimately availed of the same. Therefore, having regard to the facts obtaining in the case, the High Court was fully justified in declining to exercise its jurisdiction under Articles 226 and 227 of the Constitution.”

34. Here again, we must not lose sight of the fact that the Supreme Court has carefully used the words “ordinarily” and “efficacious” in the above extracts. The Supreme Court also felt, in the case before it, that there were

disputed questions of fact and, therefore, the High Court was fully justified in declining to exercise its jurisdiction under Articles 226 and 227 of the Constitution. But, in the present case, there are virtually no disputed questions of fact. All the material is available on record and even the revenue accepts the position that the blank CDs/DVDs do not come into existence separately. When this fact is admitted, where is the question of there being any dispute that the blank CDs/DVDs are not manufactured at all ?

35. We are left to consider the decisions cited by the learned counsel for the petitioners in support of its plea that the existence of an alternative remedy would not bar the High Court from exercising its jurisdiction under Article 226 of the Constitution of India.

36. In *Calcutta Discount Company Ltd* (*supra*), the Supreme Court held that the existence of an alternative remedy is not always a sufficient reason for refusing a party a quick relief by a writ. Furthermore, the Supreme Court held as under:-

“... When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such reliefs in fit cases and the courts would be failing to perform their duty if relief is refused without adequate

reasons. In the present case we can find no reason for which relief should be refused.”

It would be relevant to notice that the said decision in *Calcutta Discount Company Ltd* (*supra*) is a Constitution Bench decision and that it was also a case where an assessment order had been passed, yet, the Supreme Court held as under:-

“The fact that the assessment orders have already been made does not therefore affect the company's right to obtain relief under article 226. In view however of the fact that the assessment orders have already been made we think it proper that in addition to an order directing the Income-tax Officer not to take any action on the basis of the impugned notices a further order quashing the assessment made be also issued.”

37. We feel that a similar direction is necessary in the present case also. The show cause notice is completely misconceived and so, too, is the adjudication order dated 24.09.2010. Thus, in our view, both the show cause notice as also the adjudication order are liable to be quashed.

38. Another decision relied upon by the learned counsel for the petitioner was that of the Supreme Court in the case of *Brij Fertilizers* (*supra*). In that case, the Supreme Court was of the view that though the High Court should “normally” not interfere at the stage of issuance of a show cause

notice, but where, from the facts, it is apparent that there was no material available with the department to doubt the statement on behalf of the assessee, the court could interfere. The position in the present case is somewhat similar. There is no material available with the department to controvert the factual position vis-à-vis the manufacturing process as narrated by the petitioner. In that manufacturing process, at no stage, does a blank CD/DVD come into existence. The whole basis of the impugned show cause notice and the impugned adjudication order is that the petitioner manufactures blank CDs/DVDs at an intermediate stage. When this assumption is nothing but a mere *ipse dixit* on the part of the revenue, without any foundation, the show cause notice as well as the adjudication order do not have any legs to stand on.

39. The learned counsel for the petitioner also placed reliance on ***Harbans Lal Sahania*** (*supra*), wherein the Supreme Court observed that even though there may be an alternative remedy available to the petitioner, the High Court could still exercise its writ jurisdiction. The Supreme Court held as under:-

“7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the

appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged [See: Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors.: (1998) 8 SCC 1. The present case attracts applicability of first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.”

40. Finally, in *Siemens Ltd (supra)*, the Supreme Court held that when a show cause notice was issued with pre-meditation, a writ petition would certainly be maintainable and a hearing by the revenue in such circumstances would not yield any fruitful purpose. The exact words used by the Supreme Court were as under:-

“8. Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including *State of Uttar Pradesh v. Brahm Datt Sharma and Anr.:* (1987) 2 SCC 179, *Special Director and Anr. v. Mohd. Ghulam Ghouse and Anr.:* (2004) 3 SCC 440 and *Union of India and*

Anr. v. Kunisetty Satyanarayana: (2006) 12 SCC 28, but the question herein has to be considered from a different angle, viz, when a notice is issued with pre-meditation, a writ petition would be maintainable. In such an event, even if the courts directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose [See: K.I. Shephard and Ors. v. Union of India and Ors.: (1987) 4 SCC 431. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter affidavit as also in its purported show cause.”

41. After considering the decisions referred to by the learned counsel for the parties, it is apparent that the existence of an alternative remedy does not constitute a bar against the exercise of jurisdiction under Article 226 and, in certain cases, it is open to the High Court to exercise that jurisdiction. In fact, in *Calcutta Discount Company (supra)*, the Constitution Bench has gone so far as to state that when the Constitution confers on the High Court the power to give relief, it becomes the duty of the court to give such relief and that the existence of an alternative remedy is not always a sufficient reason for refusing a party quick relief by way of a writ. We must also not forget the circumstances in which the show cause notice was issued to the petitioner. By this, we mean the previous history of the petitioner having got two officers of the revenue arrested on charges of bribery. Considered in totality, we feel that this is a fit case for exercise

of jurisdiction under Article 226 of the Constitution despite the fact that the petitioner has an alternative remedy. Of course, according to us, that remedy in the factual backdrop of this case is certainly not an equally efficacious one.

42. Therefore, both the writ petitions are allowed. The show cause notices dated 05.11.2009 and 23.09.2011 as also the adjudication order dated 24.09.2010 are quashed. The parties shall bear their own costs.

BADAR DURREZ AHMED, J

V.K. JAIN, J

JANUARY 11, 2013

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