

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1848 OF 2009

Mahindra & Mahindra Ltd. (Automotive Sector),)
a public limited Company incorporated under)
the Companies Act, 1956 having their Nashik)
Plant – 1 At 89, MIDC, Satpura, Nashik – 422)
007)Petitioner

V/s.

1. The Union of India)
through the Secretary, Ministry of Finance)
Department of Revenue North Block, New Delhi)
– 110 001)

2. The Settlement Commission, Additional)
Bench, Customs & Central Excise Utpad Shulk)
Bhavan, Bandra Kurla Complex, Bandra (East),)
Mumbai – 400 051)

3. The Commissioner of Customs (Import))
New Customs House, Ballard Estate, Mumbai –)
400 001)

4. The Additional Director General, DGCEI,)
Zonal Unit, Mumbai, IIIrd Floor, N.T.C. House,)
15 N.M. Road, Ballard Estate, Mumbai – 400 001)Respondents

Mr. Sriram Sridharan for petitioner.

Mr. J.B. Mishra a/w. Mr. Dhananjay B. Deshmukh for respondents.

**CORAM : K.R. SHRIRAM &
A.S. DOCTOR, JJ.**

DATED : 15th SEPTEMBER 2022

ORAL JUDGMENT (PER K.R. SHRIRAM, J.) :

1 Petitioner is engaged in manufacture of vehicles in India.
Petitioner had filed four applications before respondent no.2 – Settlement
Commission (hereinafter referred to as “Commission”) for settlement of four
cases. They were relating to :

(a) Show cause notice dated 25th November 2004 in respect of petitioner's requirements sourced through one M/s. Omni Design International, UK;

(b) Show cause notice dated 12th July 2005 in respect of petitioner's requirements sourced through one M/s. Fuji Technica Inc. Japan;

(c) Show cause notice dated 12th September 2005 in respect of petitioner's requirements sourced through three entities, viz., Miyazu Seisakusho Co. Ltd., Japan, Sumitomo Corporation, Japan and Durr Systems GmbH, Germany; and

(d) Show cause notice dated 4th January 2006 in respect of petitioner's requirements sourced through M/s. Renault, France.

2 These show cause notices were issued on the allegation that petitioner did not declare the entire amount payable in connection with the imported model which amounts to misdeclaration with an intent to evade payment of customs duty.

Under the first show cause notice, a demand of differential customs duty of Rs.33,16,621/- was raised.

Under the second show cause notice, a demand of differential customs duty of Rs.3,91,69,685/- was raised.

Under the third show cause notice, a demand of differential customs duty of Rs.1,41,53,468/- was raised. And

Under the fourth show cause notice, a demand of differential customs duty of Rs.4,04,567/- was raised.

3 A final order dated 29th/31st January 2008 was passed as regards the first show cause notice by respondent no.2 holding that the customs duty liability as proposed in the show cause notice was payable. Petitioner was directed to pay interest at the rate of 10% p.a. and since it was not a case of organised racketeering leading to evasion of duty but because there was undervaluation, penalty in excess of Rs.1,00,000/- was waived. Alongwith petitioner, there were other co-applicants who were granted immunity from prosecution.

4 Respondent no.2, by a final order dated 29th/31st January 2008, as regards the second show cause notice, held that the customs duty liability as proposed in the show cause notice was payable, interest at the rate of 10% p.a. was also payable on the ground that petitioner has derived financial benefit by not paying the differential duty that was payable and waived the penalty in excess of Rs.10,00,000/-. Petitioner was also granted immunity from prosecution.

5 By a final order dated 29th/31st January 2008, as regards the third show cause notice, respondent no.2 held that the customs duty liability as proposed in the show cause notice was payable, interest at the rate of 10% p.a. was payable by petitioner on the differential duty and penalty in excess of Rs.5,00,000/- was waived. Petitioner was

also granted immunity from prosecution.

6 By a final order dated 29th/31st January 2008, as regards the fourth show cause notice, respondent no.2 held that the customs duty liability as proposed in the show cause notice was payable, interest at the rate of 10% p.a. was payable on the differential duty and petitioner was also granted immunity from penalty and prosecution.

7 Petitioner filed four writ petitions in this Court against the orders passed by respondent no.2 on the four applications being Writ Petition No.3519 of 2008, Writ Petition No.3517 of 2008, Writ Petition No.3516 of 2008 and Writ Petition No.3520 of 2008. All the four writ petitions were disposed by an order dated 4th September 2008 and the matters were remanded to respondent no.2. This Court quashed and set aside the four orders of respondent no.2 in so far as the said order related to imposition of penalty and interest at 10% on the customs duty other than the basic customs duty. Respondent no.2 was directed to pass fresh orders on merits after hearing both the parties on the said issues. Accordingly, respondent no.2 gave a final hearing on 19th November 2008 and after hearing the representative for petitioner and representative for Revenue passed a common final order dated 5th January 2009, which is impugned in this petition. Respondent no.2 has confirmed its earlier order and in the impugned order has only recorded the reasons why the orders passed by it earlier, which were impugned in the four petitions that were disposed by

this Court, were correct.

8 It is petitioner's case that though the law is well settled that a challenge to an order of Settlement Commission when made in a petition under Article 226 of the Constitution of India, the Court should be concerned only with the legality of procedure followed and not with the validity of the order, it is also well settled that the scope of enquiry by the Court should also consider whether the order of the Commission is in conformity with the provisions of law or contrary to the provisions and that such contravention has prejudiced petitioner. If the order of the Commission is contrary to the provisions of law, certainly the Court should interfere. This is the entire basis of petitioner's case. In support of this submission, Mr. Sridharan relied upon a judgment of the Apex Court in the matter of *Jyotendrasinhji V/s. S.I. Tripathi and Ors.*¹, where paragraph 16 reads as under :

16. It is true that the finality clause contained in Section 245-I does not and cannot bar the jurisdiction of the High Court under Article 226 or the jurisdiction of this court under Article 32 or under Article 136, as the case may be. But that does not mean that the jurisdiction of this Court in the appeal preferred directly in this court is any different than what it would be if the assessee had first approached the High Court under Article 226 and then come up in appeal to this court under Article 136. A party does not and cannot gain any advantage by approaching this Court directly under Article 136, instead of approaching the High Court under Article 226. This is not a limitation inherent in Article 136; it is a limitation which this court imposes on itself having regard to the nature of the function performed by the Commission and keeping in view the principles of judicial review. May be, there is also some force in what Dr. Gauri Shankar says viz., that the order of commission is in the nature of a package deal and that it may not be possible, ordinarily speaking, to dissect its order and that the assessee should not be

1. 1993 (3) SCC 389 (SC)

*permitted to accept what is favourable to him and reject what is not. According to learned counsel, the Commission is not even required or obligated to pass a reasoned order. Be that as it may, the fact remains that it is open to the Commission to accept an amount of tax by way of settlement and to prescribe the manner in which the said amount shall be paid. It may condone the defaults and lapses on the part of the assessee and may waive interest, penalties or prosecution, where it thinks appropriate. Indeed, it would be difficult to predicate the reasons and considerations which induce the commission to make a particular order, unless of course the commission itself chooses to, give reasons for its order. Even if it gives reasons in a given case, the scope of enquiry in the appeal remains the same as indicated above viz., whether it is, contrary to any of the provisions of the Act. In this context, it is relevant to note that the principle of natural justice (and *alteram partem*) has been incorporated in Section 245-D itself. The sole overall limitation upon the Commission thus appears, to be that it should act in accordance with the provisions of the Act. The scope of enquiry, whether by High Court under Article 226 or by this Court under Article 136 is also the same whether the order of the Commission is contrary to any of the provisions of the Act and if so, has it prejudiced the petitioner/appellant apart from ground of bias, fraud & malice which, of course, constitute a separate and independent category. Reference in this behalf may be had to the decision of this Court in *Sri Ram Durga Prasad v. Settlement Commission* 176 I.T.R. 169, which too was an appeal against the orders of the Settlement Commission. Sabyasachi Mukharji J., speaking for the Bench comprising himself and S.R. Pandian, J. observed that in such a case this Court is "concerned with the legality of procedure followed and not with the validity of the order." The learned Judge added 'judicial review is concerned not with the decision but with the decision-making process.' Reliance was placed upon the decision of the House of Lords in *Chief Constable of the N.W. Police v. Evans*, [1982] 1 W.L.R.1155. Thus, the appellate power under Article 136 was equated to power of judicial review, where the appeal is directed against the orders' of the Settlement Commission. For all the above reasons, we are of the opinion that the only ground upon which this Court can interfere in these appeals is that order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant. The main controversy in these appeals relates to the interpretation of the settlement deeds though it is true, some contentions of law are also raised. The commission has interpreted the trust deeds in a particular manner, Even if the interpretation placed by the commission the said deeds is not correct, it would not be a ground for interference in these appeals, since a wrong interpretation of a deed of trust cannot be said to be a violation of the provisions of the Income Tax Act. it is equally clear that the interpretation*

placed upon the said deeds by the Commission does not bind the authorities under the Act in proceedings relating to other assessment years.

(emphasis supplied)

9 Mr. Sridharan also relied upon another judgment of the Apex Court in ***Union of India V/s. Asahi India Safety Glass Ltd.***² where the Apex Court upheld the conclusion arrived at by the Delhi High Court that the Court should interfere where the Commission had gone wrong in law.

10 Mr. Mishra ofcourse submitted that there is no error committed by the Commission and the Commission has correctly applied the legal provisions.

11 It is Mr. Sridharan's case that Section 90 of the Finance Act, 2000 related to surcharge, Section 3 of the Customs Tariff Act, 1975 related to additional duty of customs equal to excise duty and Section 3A of the Customs Tariff Act, 1975 related to special additional duty of customs and none of these provisions provided for imposition of penalty or interest on the chargeable duty thereunder. Therefore, there was no power under the provisions of law to impose penalty or interest.

It was also submitted that the basic customs duty with surcharge had already been paid and the penalty and interest has been levied only on the differential duty which the show cause notice alleged petitioner had evaded and since neither Section 3 nor Section 3A of the Customs Tariff Act, 1975 or the Finance Act, 2000 provided for imposition

2. 2015 (320) E.L.T. 179 (SC)

of penalty or interest, there is no power under the Act to impose the same upon petitioner.

12 Mr. Mishra submitted that :

(a) the additional customs duty and special additional duty of customs or surcharge though charged under different statutes are duties of customs and, therefor, Section 28AB of the Customs Act, 1962 (as then prevailing) is applicable;

(b) these duties are part of total customs duty and calculated by taking into consideration value of the goods as well as the basic customs duty and since petitioner had mis-stated the assessable value by undervaluing the imported goods, respondent no.2 was justified in directing interest and penalty was payable by petitioner;

(c) under Section 127C of the Customs Act, 1962, respondent no.2 had the inherent authority or power to determine the terms of settlement covering not only the amount of duty but also interest and penalty; and

(d) under Section 127H of the Customs Act, 1962, respondent no.2 has the power to grant immunity from prosecution and penalty subject to such conditions as it may think fit to impose. Such a power has been exercised by the Commission in imposing penalty and interest upon petitioner and, therefore, respondent no.2 cannot be faulted. Mr. Mishra submitted that there is nothing in the order to be concerned that the legality of procedure was not followed. Since there is nothing wrong with the

validity of the order, the Court should not interfere and should dismiss the petition.

13 Therefore, the issue that requires to be decided by this Court in this petition is limited to leviability of interest and penalty in relation to amounts payable as duty other than basic customs duty.

14 Having considered the judgment of the Apex Court in *Jyotendrasinhji* (Supra), the law is very clear that though the order of the Commission is in the nature of a package deal and it may not be possible always, to dissect its order and the assessee should not be permitted to accept what is favourable to him and reject what is not, if the Court is satisfied that the order of the Commission is contrary to the provisions of the Act, the Court should interfere. Did respondent no.2 act contrary to the provisions of law by holding that interest at 10% was payable on the differential duty and imposing penalty as mentioned in the impugned order? Let us examine.

15 Section 3, Section 3A and Section 9A of the Customs Tariff Act, 1975, as it was prevailing on 15th July 2000, read as under :

Section 3. Levy of additional duty equal to excise duty - (CVD)

(1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article.

Explanation.- In this section, the expression " the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India, or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty.

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(5) The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

(6) The provisions of the Customs Act, 1962 (52 of 1962), and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties, shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.

(emphasis supplied)

Section 3A. Special additional duty - (SAD)

(1) Any article which is imported into India shall in addition be liable to a duty (hereinafter referred to in this section as the special additional duty), which shall be levied at a rate to be specified by the Central Government, by notification in the Official Gazette, having regard to the maximum sales tax, local tax or any other charges for the time being leviable on a like article on its sale or purchase in India :

Provided that until such rate is specified by the Central Government, the special additional duty shall be levied and collected at the rate of eight per cent of the value of the article imported into India.

Explanation. - In this sub-section, the expression "maximum sales tax, local tax or any other charges for the time being leviable on a like article on its sale or purchase in India" means the maximum sales-tax, local tax, other charges for the time being in force, which shall be leviable on a like article, if sold or purchased in India, or if a like article is not so sold or purchased which shall be leviable on the class or description of articles to which the imported article belongs.

(2) For the purpose of calculating under this section the special additional duty on any imported article, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962 or section 3 of this Act, be the aggregate of -

(i) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section (2) of that section, as the case may be;

(ii) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but not including the special additional duty referred to in sub-section (1); and

(iii) the additional duty of customs chargeable on that article under section 3 of this Act.

(3) The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

(4) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.

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(emphasis supplied)

Section 9A. Anti- dumping duty on dumped articles -

(1) Where any article is exported from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

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(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, relating to non-levy, short levy, refunds and appeals shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

(emphasis supplied)

16 Section 90 of the Finance Act, 2000 reads as under :

Section 90. Surcharge of customs :

(1) In the case of goods mentioned in the First Schedule to the

Customs Tariff Act, or in that Schedule, as amended from time to time, there shall be levied and collected as surcharge of customs, an amount, equal to ten per cent of the duty chargeable on such goods calculated at the rate specified in the said First Schedule, read with any notification for the time being in force, issued by the Central Government in relation to the duty so chargeable.

(2) Sub-section (1) shall cease to have effect after the 31st day of March, 2001, and upon such cesser, section 6 of the General Clauses Act, 1897 (10 of 1897) shall apply as if the said sub-section had been repealed by a Central Act.

(3) The surcharge of customs referred to in sub-section (1) shall be in addition to any duties of customs chargeable on such goods under the Customs Act or any other law for the time being in force.

(4) The provisions of the Customs Act and the rules and regulations made thereunder, including those relating to refunds, drawbacks and exemptions from duties, shall, as far as may be, apply in relation to the levy and collection of surcharge of customs leviable under this section in respect of any goods as they apply in relation to the levy and collection of the duties of customs on such goods under that Act or those rules and regulations, as the case may be.

(emphasis supplied)

17 Section 12, 28 and 28AB of the Customs Act, 1962, as it existed in 2000-2001, also read as under :

Section 12. Dutiable goods -

(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.

Section 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 mis-statement 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:

Provided further that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable has not been paid, part paid or erroneously refunded is one crore rupees or less, a notice under this sub-section shall be served by the Commissioner of Customs or with his prior approval by any officer subordinate to him :

Provided also that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable thereon has not been paid, part paid or erroneously refunded is more than one crore rupees, no notice under this sub-section shall be served except with the prior approval of the Chief Commissioner of Customs.

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.

(2) The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) For the purposes of sub-section (1), the expression “relevant date” means, -

(a) in case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;

(c) in a case where duty or interest has been erroneously refunded, date of refund;

(d) in any other case, the date of payment of duty or interest.

Section 28AB. Interest on delayed payment of duty in special cases -

(1) Where any duty has not been levied or has been short levied or erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty as determined under sub-section (2) of section 28, shall, in addition to the duty, be liable to pay interest (at such rate not below eighteen per cent and not exceeding thirty six per cent per annum, as is for the time being fixed by the Central Government, by Notification in the Official Gazette), from the first day of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2) of section 28, till the date of payment of such duty.

(2) For the removal of doubts, it is hereby declared that the provisions of sub-section (1) shall not apply to cases where the duty became payable before the date on which the Finance (No.2) Bill, 1996 receives the assent of the President.

Explanation 1 – Where the duty determined to be payable is reduced by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, the interest shall be payable on such reduced amount of duty.

Explanation 2 – Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, the interest shall be payable on such increased or further increased amount of duty.

(emphasis supplied)

18 Sub-section (8) of Section 9A of the Customs Tariff Act, 1975, after it was amended by the Finance (No.2) Act, 2004, reads as under :

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(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder (relating to, the date for determination of rate of duty, non levy, short levy, refunds, interest, appeals, offences and penalties) shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

(emphasis supplied)

19 When a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. As held by the Apex Court in the matter of *J.K. Synthetics Ltd. V/s. Commercial Taxes Officer*³ relied upon by Mr. Sridharan, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law.

20 Section 28AB of the Customs Act, 1962 is a taxing provision which creates and fastens the liability on a party. The provision has to be strictly construed and will be governed by the language employed in the section. The Apex Court in the matter of *India Carbon Ltd. & Ors. V/s. State of Assam*⁴, relied upon by Mr. Sridharan, after quoting paragraph 16 of *J.K. Synthetics Ltd.* (Supra), held that the proposition that may be derived from *J.K. Synthetics Ltd.* (Supra) is interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a

3. 1994 SCC (4) 276

4. 1997 (6) SCC 479

substantive provision in this behalf. The Court held that where there is no substantive provision requiring the payment of interest, the authorities cannot, for the purpose of collecting and enforcing payment of tax, charge interest thereon.

21 It is petitioner's case, as noted earlier, that provision relating to interest and penalty are not borrowed under Finance Act, 2000 and under Section 3 and 3A of the Customs Tariff Act, 1975, and hence no interest and penalty can be levied on the portion of demand pertaining to surcharge, additional duty being countervailing duty (CVD) and special additional duty (SAD) being levied under Section 3 and Section 3A of the Customs Tariff Act, respectively. The total duty demand raised in the show cause notices consist of the demand of basic customs duty under Section 12 of the Customs Act, 1962, surcharge of customs duty under Section 90 of the Finance Act, 2000, additional duty of customs equal to excise duty under Section 3 of the Customs Tariff Act, 1975 (CVD) and special additional duty of customs under Section 3A of the Customs Tariff Act, 1975 (SAD).

It is also petitioner's case that Section 28AB of the Customs Act, 1962, interest on delayed payment of duty is applicable only for customs duty leviable under Section 12 of the Customs Act, 1962. Section 90 of the Finance Act, 2000 relating to surcharge, Section 3 of the Customs Tariff Act, 1975 relating to additional duty of customs and Section 3A of the Customs Tariff Act, 1975 relating to special additional duty of customs do not borrow the provisions of Customs Act, 1962 relating to interest.

22 In *M/s. Khemka and Co. (Agencies) Pvt. Ltd. V/s. State of Maharashtra*⁵, that Mr. Sridharan relied upon, the question that the Court had to answer was whether the assessee under the Central Sales Tax Act, 1956 could be made liable for penalty under the provisions of the State Sales Tax Act. The petitioner contended that there is no provision in the Central Act for imposition of penalty for delay or default in payment of tax and, therefore, imposition of penalty under the provisions of the State Sales Tax Act for delay or default in payment of tax is illegal. The rival contention on behalf of the Revenue was that the provision for penalty for default in payment of tax as enacted in the State Sales Tax Act was applicable to the payment and collection of the tax under the Central Sales Tax Act and is incidental to and part of the process of such payment and collection. The Apex Court held that a penalty is a statutory liability and is in addition to tax and a liability under the Act. There must be a charging section to create liability. There must be, firstly a liability created by the Act, secondly, the Act must provide for assessment and thirdly, the Act must provide for enforcement of the taxing provisions. The Court held that there must be specific provisions to create liability. Paragraphs 25 to 28 of *M/s. Khemka and Co. (Agencies) Pvt. Ltd.* (Supra) read as under :

25. Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. Reference may be made to section 28 of the Indian Income-tax Act, 1922 where penalty is provided for concealment of income. Penalty is in addition to the amount of income-tax. This Court in Jain Brothers & Ors. v.

5. (1975) 2 SCC 22

Union of India said that penalty is not a continuation of assessment proceedings and that penalty partakes of the character of additional tax.

26. The Federal Court in Chaturam & Ors. v. Commissioner of Income-tax, Bihar said that liability does not depend on assessment. There must be a charging section to create liability. There must be, first a liability created by the Act. Second, the Act must provide for assessment. Third, the Act must provide for enforcement of the taxing provisions. The mere fact that there is machinery for assessment, collection and enforcement of tax and penalty in the State Act does not mean that the provision for penalty in the State Act is treated as penalty under- the Central Act. The meaning of penalty under the Central Act cannot be enlarged by the provisions of machinery of the State Act incorporated for working out the Central Act.

27. This Court in State of Tamil Nadu v. K. A. Ramudu Chettiar & Co. said that the power to enhance assessment which was contained in the Madras Act of 1959 though such power was not available under the 1939 Act would be available in respect of assessment under the Central Act. Enhancement of assessment is in the process of assessment. It is a procedural power. The liability to tax is created by the statute. Therefore, when the power to assess is attracted a fortiori enhancement is within the power.

28. For the foregoing reasons we are of opinion that the provision in the state Act imposing penalty for non-payment of income-tax within the prescribed time is not attracted to impose penalty on dealers under the Central Act in respect of tax and penalty payable under the Central Act. There is no lack of sanction for payment of tax. Any dealer who would not comply with the provisions for payment of tax, would be subjected to recovery proceedings under the public Demands Recovery Act. A penalty is a statutory liability. The Central Act contains specific provisions for penalty. Those are the only provisions for penalty available against the dealers under the Central Act. Each State Sales Tax Act contains provisions for penalties. These provisions in some cases are also for failure to submit return or failure to register. It is rightly said that those provisions cannot apply to dealers under the Central Act because the Central Act makes similar provisions. The Central Act is a self contained code which by charging section creates liability for tax and which by other sections creates a liability for penalty and impose penalty. Section 9(2) of the Central Act creates the State authorities as agencies to carry out the assessment, reassessment, collection and enforcement of tax and penalty by a dealer under the Act.

(emphasis supplied)

Therefore, penalty is not a continuation of assessment proceedings and penalty partakes of the character of additional tax. There must be a charging section to create liability. Section 3 and Section 3A of the Customs Tariff Act, 1975 are charging sections creating liability for CVD and SAD but does not provide for penalty. The mere fact that there is machinery for assessment, collection and enforcement of tax and penalty under the Customs Act, 1962 does not mean that the provision for penalty and interest in the Customs Act, 1962 is treated as applicable for penalty and interest under the Customs Tariff Act, 1975. The meaning of penalty or interest under the Customs Tariff Act, 1975 cannot be enlarged by the provisions of machinery of the Customs Act, 1962 incorporated for working out the Customs Tariff Act, 1975.

23 In another matter before the Apex Court in *Collector of Central Excise, Ahmedabad V/s. Orient Fabrics Pvt. Ltd.*⁶, cited by Mr. Sridharan, the question that came up for consideration was as regards to jurisdiction of the authorities under the Central Excise Act, whether it is permissible to resort to penalty proceedings or forfeiture of goods for non-payment of additional duty in terms of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 by taking recourse to the provisions of the Central Excise Act and Rules framed thereunder. There also Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 was similar to the provisions of sub-section (6) of Section 3 and sub-section (4)

6. 2003 (158) E.L.T. 545 (SC)

of Section 3A of the Customs Tariff Act, 1975. While interpreting the provisions, the Court held that it is no longer *res integra* that when the breach of the provision of the Act is penal in nature or a penalty is imposed by way of additional tax, the constitutional mandate requires a clear authority of law for imposition for the same. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. The authority has to be specific, explicit and expressly provided. Paragraphs 5, 6, 7 and 9 of *Orient Fabrics Pvt. Ltd.* (Supra) read as under :

5. In order to appreciate the issue, it is relevant to set out the sub-section (3) of Section 3 of the Act, as applicable in this matter and which runs as under :

"SECTION 3 : Levy and collection of additional duties :

(1).....

(2).....

(3) The provisions of the Central Excises and Salt Act, 1944 and the rules made thereunder including those relating to refunds and exemptions from duty shall, so far as may be, apply in relation to the levy and collection of the additional duties as they apply in relation to the levy and collection of the duties of excise on the goods specified in sub-section (1)."

6. A perusal of the said provision shows that the breach of provision of the Act has not been made penal or an offence and no power has been given to confiscate the goods. It only provides for application of the procedural provisions of the Central Excises and Salt Act, 1944 and the Rules made thereunder. It is no longer res integra that when the breach of the provision of the Act is penal in nature or a penalty is imposed by way of additional tax, the constitutional mandate requires a clear authority of law for imposition for the same. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. The authority has to be specific and explicit and expressly provided. The Act created liability for additional duty for excise, but created no liability for any penalty. That being so, the confiscation proceedings against the respondents were unwarranted and without authority of law.

7. *The Parliament by reason of Section 63(a) of the Finance Act, 1994 (Act No. 32 of 1994) substituted sub-section (3) of Section 3 of the said Act, which now reads as under :*

3. *Levy and collection of Additional Duties :*

(1)

(2)

(3) *The provisions of the Central Excise Act, 1944 (1 of 1944), and the rules made thereunder, including those relating to refunds, exemptions from duty, offences and penalties, shall, so far as may be, apply in relation to the levy and collection of the additional duties as they apply in relation to the levy and collection of the duties of excise on the goods specified in sub-section (1)."*

8. *A comparison of the amended provisions with the unamended ones would clearly demonstrate that the words 'offences and penalties' have consciously been inserted therein. The cause of action for imposing the penalty and directions of confiscation arose in the present case in they year 1987. The amended Act, therefore, has no application to the facts of this case.*

(emphasis supplied)

24 The Delhi High Court in *Pioneer Silk Mills Pvt. Ltd. V/s. Union of India*⁷, relied upon by Mr. Sridharan, while dealing with similar provisions under the Central Excises and Salt Act, 1944 and the Rules made thereunder read with Additional Duties of Excise (Goods of Special Importance) Act, 1957, held that Act shall have specific provisions which creates a charge in the nature of penalty. The Court held that when penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof. Paragraphs 32, 36, 37 and 39 of *Pioneer Silk Mills Pvt. Ltd.* (Supra) read as under :

32. *Considering the ratio of the decisions aforesaid we are of*

7. 1995 (80) E.L.T. 507 (Del.)

the opinion that there is no provision in the Additional Duties Act which creates a charge in the nature of penalty. We further find that the term "levy and collection" in Section 3(3) of the Additional Duties Act has a restricted meaning in view of the use of the words "including those relating to refund and exemptions from duty". Otherwise these words were rather unnecessary. In Orissa Cement v. State of Orissa, the question before the Supreme Court was whether rebate provided in section 13 (8) of the Orissa Sales Tax Act was available to dealers if they paid the tax under the CST Act before due date of payment. The court said that rebate for payment of tax within the prescribed time under the State Act was available to dealers for payment of tax under the CST Act on the reasoning that the power to collect the tax assessed in the same manner as the tax on the sale and purchase of goods under the general sales tax law of the State would include within itself all concessions given under the State Act for payment within the prescribed period. The Supreme Court in Khemka's case observed respecting this case that the reason why rebate was allowed and penalty was disallowed was that rebate was a concession whereas penalty was an imposition. The concession did not impose liability but penalty did. It, therefore, stood to reason that rebate was included within the procedural part of collection and enforcement of payment, and penalty like imposition of tax could not be included within the procedural part.

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36. We are, thus, of the opinion that the argument that various sections falling in Chapter II of the Central Excises Act which has the heading "Levy and Collection" would all be construed as provisions for levy and collection of additional duty as well, is of no avail to the revenue and we reject this argument. In fact, as noted above, Chapter II contains no provision for levy of penalty.

37. When penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof. If long drawn arguments are needed to explain the Act by referential legislation, or legislation by incorporation levies penalty or not, it is better for the court to lean in favor of the tax payer. There is no room for presumption in such a case. The mere fact that all these years the Additional Duty Act has not been challenged on this ground is of no consequence if authority of law as mandated by the Constitution is lacking. We may also note in the passing that it was submitted before us that penalty so realised earlier has never been distributed among the States as part of act proceeds of the collection of the additional duties of excise under the Additional Duties Act. This statement, made at the Bar was not challenged. Since, however, this point was not raised in the writ petition and the revenue had no opportunity to reply in its counter-affidavit, we leave the matter at that, Levy of penalty which

is an additional tax has to be under the authority of law which should be clear, specific and explicit.

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39. We have given our considerable thought to various arguments raised by the parties. We find there is no mandate in the Additional Duties Act for levy of penalty and the Central Excises Act and the Rules made there under cannot be imported in the Additional Duties Act for the purpose of levy of penalty. We have spent anxious moments as the interpretation we have put has grave consequences for the revenue as similar terminology as used in section 3(3) of the Additional Duties Act has been used in various Finance Acts and other enactments, but then Article 265 of the Constitution mandates that no tax shall be levied and collected except by authority of law. There being no such authority of law to levy penalty, we have to hold so.

(emphasis supplied)

This judgment, we are informed, was confirmed by the Apex Court. Therefore, when penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof. Where the Act has to be explained by referential legislation or legislation by incorporation levies penalty or not, it is better for the Court to lean in favour of the tax payer. There is no room for presumption in such cases.

25 The Gujarat High Court in ***C.C.E. & C., Surat-I V/s. Ukai Pradesh Sahakari Khand Udyog Mandli Ltd.***⁸, (relied upon by Mr. Sridharan), while dealing with the provisions of the Central Excise Act read with the Sugar Export Promotion Act, 1958, also held that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. In ***Ukai Pradesh Sahakari Khand Udyog Mandli Ltd.*** (Supra), sub-section (4) of

8. 2011 (271) E.L.T. 32 (Guj.)

Section 7 of Sugar Export Promotion Act, 1958 reads as under :

(4) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duty, shall, so far as may be, apply in relation to the levy and collection of the duty of excise or any other sum referred to in this section as they apply in relation to the levy and collection of the duty on sugar or other sums of money payable to the Central Government under that Act or the rules made thereunder.

This provision is similar to the provision in sub-section (6) of Section 3 and sub-section (4) of Section 3A of the Customs Tariff Act, 1975. Paragraph 17 of *Ukai Pradesh Sahakari Khand Udyog Mandli Ltd.* (Supra) reads as under :

17. From the principles enunciated in the above referred decisions, it is apparent that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. In the facts of the present case, as noted hereinabove, section 7 of the Sugar Export Promotion Act, 1958 does not make any provision for levy and charge of interest on the duty of excise payable under sub-section (1) thereof. In the circumstances, there being no substantive provision in the Act for levy of interest on late payment of tax, no interest thereon could be so levied based on the application of sub-section (4) of section 7 of the said Act. In the circumstances, the Tribunal was justified in holding that there being no provision for interest in the Act, there was no justification or warrant to confirm the interest, in the absence of any powers vested in the authorities under the Act.

(emphasis supplied)

Therefore, it is again made clear that in the absence of specific provisions for levying of interest or penalty due to delayed payment of tax unless the statute makes a substantive provision in this behalf, the same cannot be levied/charged.

26 Sub-section (6) of Section 3 and sub-section (4) of Section 3A of the Customs Tariff Act, 1975 does not provide for any interest or penalty. Neither Section 90 of the Finance Act, 2000 provides for the same. Therefore, no interest and penalty can be levied on the portion of payment pertaining to surcharge, CVD and SAD.

We must also note that sub-section (8) of Section 9A of the Customs Tariff Act, 1975, prior to the 2004 amendment, did not include interest and penalties. By Section 76 of Finance (No.2) Act, 2004, the words in sub-section (8) of Section 9 of the Customs Tariff Act, 1975 "*relating to non levy, short levy, refunds and appeals*" were replaced with "*relating to, the date for determination of rate of duty, non levy, short levy, refunds, interest, appeals, offences and penalties*". No such amendment to include interest and penalty was inserted in sub-section (6) of Section 3 or sub-section (4) of Section 3A of the Customs Tariff Act, 1975. Therefore, the intention of the legislature was very clear that it wanted to include interest and penalties only with regard to anti-dumping duty on dumped articles and not for CVD, i.e., levy of additional duty equal to excise duty and SAD, i.e., special additional duty. No such insertion or amendment was made in Section 90 of the Finance Act, 2000 relating to surcharge. Therefore, interest and penalty cannot be levied on the portion of demand pertaining to surcharge under Section 90 of the Finance Act, 2000 or additional duty of customs under Section 3 or special additional duty of customs under the Customs Tariff Act, 1975.

27 Sub-section (6) of Section 3 and sub-section (4) of Section 3A of the Customs Tariff Act, 1975 makes applicable to the duty chargeable under Section 3 and Section 3A the provisions of the Customs Act, 1962 and the rules and regulations made thereunder including those relating to drawbacks, refunds, exemptions from duties so far as it applies to Section 3 and so far as Section 3A is concerned, it is relating to non levy, short levy, refunds and appeals. Similarly, sub-section (4) of the Finance Act, 2000 makes applicable the provisions of the Customs Act and the rules and regulations thereunder in relation to the levy and collection of surcharge. Both sub-section (6) of Section 3 and sub-section (4) of Section 3A of the Customs Tariff Act, 1975 or sub-section (4) of the Finance Act, 2000 make no reference to interest or penalty. There is no substantive provision in Section 3 or Section 3A under the Customs Tariff Act, 1975 or Section 90 of the Finance Act, 2000 requiring payment of penalty or interest. There is, therefore, no substantive provision which obliges a party to pay interest or penalty on CVD, i.e., the additional duty equal to excise duty or SAD, i.e., special additional duty to be levied at a rate having regard to the maximum sales tax or local tax or any other charges leviable on a like article or surcharge to be levied under the Finance Act, 2000.

28 A perusal of sub-section (6) of Section 3 and sub-section (4) of Section 3A of the Customs Tariff Act, 1975 or Section 90 of the Finance Act, 2000 show that the breach of the provisions has not been made penal or an offence. It only provides for application of the procedural provisions of the

Customs Act, 1962 and the rules and regulations made thereunder so far as it apply to the duty chargeable under Section 3 or Section 3A of the Customs Tariff Act, 1975 or levy and collection under Section 90 of the Finance Act, 2000. As stated earlier, if penalty or interest has to be levied on CVD or SAD or surcharge, the authority has to be specific and explicit and expressly provided. The Customs Tariff Act, 1975 provides for additional customs duty and special additional duty but creates no liability for penalty or interest for additional duty or special additional duty. Likewise the Finance Act, 2000 under Section 90. That being so imposing penalty or interest on additional duty and special additional duty or surcharge which is not connected to the basic customs duty is unwarranted or without authority of law.

29 Further the Customs Act, 1962 under Section 28 provides for recovery of dues and under Section 28AB provides for interest on delayed payment of duty. Both are separate provisions and in our view, the incorporating provisions would apply only to the duty leviable under the Customs Act and not interest on delayed payment of duty or penalty because as time and again Courts have held that taxing statute have to be incorporated strictly and tax can be imposed only when the language of the statute expressly provided for it. The authority has to be provided specifically, explicitly and expressly. Moreover, CVD, SAD and surcharge are in addition to the basic customs duty. Sub-section (5) of Section 3 and sub-section (3) of Section 3A of Customs Tariff Act, 1975 provide that the

duty chargeable under the said sections will be in addition to any other duty imposed under the Customs Tariff Act, 1975 or any other law for the time being in force. Sub-section (3) of Section 90 of the Finance Act, 2000 say the surcharge shall be in addition to any duties of customs under the Customs Act or under any other law for the time being in force.

30 As stated earlier, sub-section (6) of Section 3 and sub-section (8) of Section 3A of the Customs Tariff Act, 1975 referred to the procedural aspect and machinery provisions under the Customs Act, 1975 and not the charging provisions. So also Section 90 of the Finance Act, 2000. As held by the Apex Court in *Jain Brothers V/s. Union of India*⁹, which was also cited by Mr. Sridharan, penalty was not a continuation of assessment proceedings and penalty partook all the character of the additional tax. There is no provision under Section 3 for additional duty or Section 3A for special additional duty under the Customs Tariff Act, 1975 or Section 90 of the Finance Act, 2000 that creates a charge in the nature of penalty or interest.

31 Our attention has been drawn by Mr. Sridharan to two judgments of this Court in *Union of India V/s. Valecha Engineering Ltd.*¹⁰ and *Indo Swiss Embroidery Industries Ltd. V/s. Commissioner of Central Excise, Vapi*¹¹. In *Valecha Engineering (supra)*, the Court was dealing with the levy of interest on additional duty of customs under Section 3 of the Customs Tariff Act and on special additional duty of customs under Section

9. AIR 1970 SC (778)

10. 2010 (249) E.L.T. 167 (Bom.)

11. 2017 (356) E.L.T. 226 (Bom.)

3A of the Customs Tariff Act. In *Indo Swiss Embroidery Industries (supra)*, the Court was dealing with the levy of interest and penalty on the additional duties of excise leviable under Section 3 of the Additional Duties of Excise (Textiles & Textile Articles) Act, 1978 ('ADE (T&TA) Act'). Section 3(3) of the ADE (T&TA) Act is pari-materia to Section 3(6) and Section 3A(4) of the Customs Tariff Act. The ADE (T&TA) Act did not contain any provision for the imposition of interest and penalty. This Court in *Indo Swiss Embroidery Industries (supra)* followed the decision of the Apex Court in *Orient Fabrics (supra)* and held that, in the absence of specific provisions in the ADE (T&TA) Act for the imposition of interest and penalty, there could be no levy of interest or penalty on the additional duties of excise payable under Section 3 of the said Act. It was held that taxing statutes must be construed strictly and that Section 11AC (for penalty) and Section 11AB (for interest) of the Central Excise Act were inapplicable.

32 In *Valecha Engineering (Supra)*, the judgments of the Hon'ble Apex Court in *Orient Fabrics (Supra)*, *India Carbon (Supra)* and *J.K. Synthetics (Supra)* were referred to. It was held in paragraphs 14-16 and 27 that interest and penalty can be only leviable if there be substantive provisions in the statute imposing interest and penalty. However, in paragraph 30, it was then held that provisions for interest form part of machinery provisions. This observation in *Valecha Engineering (Supra)* is purportedly based on the ratio of *India Carbon (Supra)* and *J.K. Synthetics (Supra)*. In the decisions of the Apex Court in *India Carbon (Supra)* and *J.K.*

Synthetics (Supra) interest and penalty were held to be substantive in nature. In *J.K. Synthetics* (Supra) it was held as follows:

“Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as substantive law and not adjectival law.”

In *India Carbon* (supra) it was held as follows:

“7. This proposition may be derived from the above: interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf.”

In *Khemka & Co. (supra)* it was held as follows:

“25. Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act.”

It is, therefore, clear from these judgments of the Supreme Court that the liability to interest and penalty is substantive and that provisions imposing interest and penalty are substantive (and not machinery).

In *Orient Fabrics* (Supra), the Apex Court interpreted Section 3(3) of Additional Duties of Excise (Goods of Special Importance) Act, 1957 which is pari-materia to Section 3, 3A of the Customs Tariff Act, 1975 and Section 90(4) of the Finance Act, 2000. Hence, the decision of the Hon'ble Apex Court in *Orient Fabrics* (Supra) would directly apply.

33 We are also unable to accept Mr. Mishra's contentions that the charging section for imposition of CVD and SAD or surcharge is Section 12

of the Customs Act, 1962. In our view, the charging sections for imposition of surcharge, CVD and SAD are Section 90(1) of the Finance Act, 2000, Section 3(1) and Section 3A(1) of the Customs Tariff Act, 1975, respectively. Mr. Mishra's contention that Section 12 is the charging section is incorrect. Section 12 of the Customs Act, 1962 reads as under :

12. Dutiable goods -

(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.

Mr. Mishra submitted that the words "*except as otherwise provided in this Act or any other law for the time being in force*" employed in Section 12 of the Customs Act, 1962, surcharge on customs duty under Section 90 of the Finance Act and CVD and SAD under the Customs Tariff Act, 1975 would all be covered under any law for the time being in force. Therefore, according to Mr. Mishra CVD under Section 3 and SAD under Section 3A of the Customs Tariff Act, 1975 and surcharge under Section 90 of the Finance Act, 2000 are all levied under Section 12 of the Customs Act, 1962. Therefore, imposing interest under Section 28AB on surcharge, CVD and SAD would be correct in law.

34 Section 9A(8) of the Customs Tariff Act, 1975 which borrowed provisions from Customs Act, 1962 did not borrow provisions relating to

interest and penalty. The Hon'ble Courts, in judgments cited supra, held that in view of no specific borrowing, no interest and penalty can be imposed on anti-dumping duty. Later on, Finance (No.2) Act, 2004 amended sub-section (8) of Section 9A suitably to include interest and penalty. However, similar amendments have not been made to Section 3(6) of the Customs Tariff Act, 1975 relating to CVD, i.e., additional duty equal to excise duty or Section 3A(4) of Customs Tariff Act, 1975 relating to SAD, i.e., special additional duty or surcharge under Section 9(3) of the Finance Act, 2000.

35 Further, Section 12 of the Customs Act, 1962 levies duty on goods imported into India at such rates as may be specified in the Customs Tariff Act, 1975. In Customs Tariff Act, 1975, Section 2 provides the rates at which duties of customs are to be levied under the Customs Act, 1962 are as specified in the first and second schedules of the Customs Tariff Act, 1975. In Section 12 of the Customs Act, 1962 there is no reference to any specific provision of Customs Tariff Act, 1975.

On the other hand levy of CVD or SAD under Section 3 or Section 3A of the Customs Tariff Act, 1975 or surcharge under Section 90 of the Finance Act, 2000 is not relatable to the first or second schedule but the rate is prescribed in those three sections itself. This itself shows the charging section for surcharge or CVD and SAD is not Section 12 of the Customs Act, 1962 but Section 90 of the Finance Act, 2000 and Section 3 and Section 3A of the Customs Tariff Act, 1975, respectively.

36 We find support for our view in *Hyderabad Industries Ltd. V/s. Union of India*¹² relied upon by Mr. Sridharan. The Apex Court considered Section 12 of the Customs Act, 1962 and went on to hold that the charging section to impose CVD is Section 3 of the Customs Tariff Act, 1975. Paragraphs 12, 13 and 14 of *Hyderabad Industries Ltd.* (Supra) read as under :

12. Section 12 of the Customs Act levies duty on goods imported into India at such rates as may be specified in the Customs Tariff Act, 1975. When we turn to Customs Tariff Act 1975, it is Section 2 which states that the rates at which duties of customs are to be levied under Customs Act 1962 are those which are specified in the First and Second Schedules of the Customs Tariff Act, 1975. In Section 12 of the Customs Act there is no reference to any specific provision of the Customs Tariff Act 1975. In other words for the purpose of determining the levy of customs duty on goods imported into India what is relevant is Section 12 of the Customs Act read with Section 2.

13. On the other hand levy of additional duty under Section 3 is equal to the excise duty for the time being leviable on the like article which is imported into India if produced or manufactured in India. The rate of additional duty under Section 3(1) on an article imported into India is not relatable to the First and the Second Schedule of the Customs Act but the additional duty if leviable has to be equal to the excise duty which is leviable under the Excise Act. This itself shows that the charging section for the levy of additional duty is not Section 12 of the Customs Act but is Section 3 of the Customs Tariff Act, 1975. This apart sub-sections (3), (5) and (6) of Section 3 refer to additional duty as being leviable under sub-section (1). In sub-section (5), for instance, it is clearly stated that the duty chargeable under Section 3 shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

14. There are different types of customs duty levied under different acts or rules. Some of them are; (a) a duty of customs chargeable under Section 12 of the Customs Act, 1962; (b) the duty in question, namely, under Section 3 (1) of the Customs Tariff Act; (c) additional duty levied on raw-materials, components and ingredients under Section 3 (3) of the Customs Tariff Act; and (d) duty chargeable under Section 9A of the Customs Tariff Act, 1975. Customs Act 1962 and the

12. 1999 (108) ELT 321 (SC)

Customs Tariff Act, 1975 are two separate independent statutes. Merely because the incidence of tax under Section 3 of the Customs Tariff Act, 1975 arises on the import of the articles into India it does not necessarily mean that the Customs Tariff Act cannot provide for the charging of a duty which is independent of the customs duty leviable under the Customs Act.

(emphasis supplied)

37 In view of the above, imposing interest and penalty on the portion of demand pertaining to surcharge or additional duty of customs or special additional duty of customs is incorrect and without jurisdiction.

38 We have to note that in the present case, it is not disputed that petitioner has paid a sum of Rs.11.84 Crores much prior to the issuance of show cause notice. There is no determination of duty under Section 28(2) of the Customs Act, 1962 and, therefore, Section 28AB of the Customs Act, 1962 is also not applicable. Petitioner has also paid the difference between the admitted duty liability and the amount settled by respondent no.2. We do not agree with respondent no.2 that CVD, SAD and surcharge are being recovered under Section 28 of the Customs Act, 1962. Consequently Section 28AB of the Customs Act, 1962 also will also not be applicable. In the absence of specific provision relating to levy of interest in the respective legislation, interest cannot be recovered by taking recourse to machinery relating to recovery of duty.

39 The finding of respondent no.2 that it has the inherent authority or power to determine the terms of settlement covering not only the amount of duty but also interest and penalty as well is *ex-facie*

untenable. Reliance by respondent no.2 upon Section 127C of the Customs Act, 1962 to direct payment of interest is totally misplaced in the case at hand. Section 127C of the Customs Act, 1962 itself provides that the order of the Settlement Commission has to be in accordance with the provisions of the Customs Act, 1962. Respondent no.2 certainly cannot pass an order beyond the provisions of the Customs Act, 1962. The provisions relating to interest contained in Section 28AB of the Customs Act, 1962 are not borrowed in the legislation imposing levy of surcharge or CVD or SAD. Respondent no.2 cannot include interest in the settlement arrived at by it on the ground that petitioner has derived financial benefits by not paying the correct rate of duty when it was due. Deriving financial benefits itself cannot be a ground to order payment of interest in the absence of any statutory provisions for payment of interest.

40 Therefore, the order of the Commission to the extent of requiring petitioner's to pay interest at the rate of 10% against the four show cause notices and penalty (Rs.1,00,000/- in the case of first show cause notice, Rs.10,00,000/- in the case of second show cause notice and Rs.5,00,000/- in the case of third show cause notice) is liable to be and are hereby quashed and set aside.

41 The Rule issued on 21st April 2009 is made absolute.

42 Respondents to refund the amount of Rs.16,00,000/- being penalty deposited by petitioner together with interest, if any, within four

weeks of receiving an application.

The bank guarantee furnished on behalf of petitioner for a sum of Rs.74,67,790/- together with the renewals to be cancelled and returned to petitioner by the Registry of this Court within four weeks of receiving an application.

43 Petition disposed. No order as to costs.

(A.S. DOCTOR, J.)

(K.R. SHRIRAM, J.)