

Appellant Rep by: Shri Sanjay Kalra, Adv.

Respondent Rep by: Shri Ramesh Kumar, AC (AR)

CORAM: D M Misra, Member (J)

Sanjiv Srivastava, Member (T)

Cus - On the basis of intelligence that the assessee was importing goods declared as "Filmtech Membrane (water filter parts)" by classifying them under CTH 84212190 and by claiming the duty exemption under Sr No 8C(ii) of notfn 6/2006-CE, investigations were initiated against them - Two live consignments imported vide B/E dated 31.03.2011 for home consumption and another B/E dated 25.04.2011 were examined and found to operate on the "Reverse Osmosis Technology" as per the product catalogue of "Dow FILMTEC Membranes" of the manufacturer Dow Europe GmbH Switzerland - These consignments were allowed provisional clearance on execution of provisional duty bond - Investigations also revealed that in past assessee had also cleared the same goods by claiming full exemption from payment of CVD under Notfn 6/2006-CE, Sr No 8B - Assessee being a manufacturer and trader of water purification equipments and parts thereof was fully aware of the actual use of the said imported item since the same were being used by them in manufacture of their own products - It was also noticed that they were paying the duty without availing the benefit under notfn 6/2006-CE, in respect of the same imported goods from the same supplier in past - Thus the importer had misrepresented and suppressed the facts about actual nature and use of the said goods to avail undue benefit of CVD exemptions - Assessee admitted and paid the duty along with interest due in respect of each B/E - After completion of investigations, a SCN was issued to assessee - The issue on merits is no longer res integra and covered by decision in case of Pure & Cure Technology 2019-TIOL-38-CESTAT-MUM - Once the assessee have paid duty and interest and have admitted their liability, they are barred in subsequent proceedings to claim the benefit of limitation in respect of the amounts so paid - It is not the case of willful misstatement, suppression or mis-declaration, but a case of bonafide error in claiming the benefit of exemption which was not due to them, no merits found in the penal proceedings undertaken against them - Assessee had in the Bill of Entries, clearly described the imported goods - Since the assessee have clearly and correctly described the imported goods as part of water filter, the error in claiming the benefit of wrong exemption notification cannot be act of deliberate misdeclaration - Hence, no merits found in the order of Commissioner imposing penalty on assessee under Section 114A: CESTAT

Appeal partly allowed

Case laws cited:

Mahavir Corporation [2003 (160) ELT 355 (TBom)]... Para 3.2

Northern Plastic Ltd - 2002-TIOL-1889-SC-CUS ... Para 3.2

Surbhit Impex P Ltd - 2012-TIOL-794-CESTAT-MUM ... Para 3.2

N D Metals Ids Ltd - 2008-TIOL-2860-CESTAT-MUM ... Para 3.2

Gaurav Enterprises - 2005-TIOL-241-HC-MUM-CUS ... Para 3.2

Padamanabh Silk Mills [2006 (193) ELT 536 (Guj)]... Para 3.2

Jaramsons Plastic Industry - 2002-TIOL-54-CESTAT-DEL-SB ... Para 3.2

Mala Bhakatani - 2002-TIOL-482-CESTAT-DEL ... Para 3.2

Bajaj Health & Nutrition P Ltd - 2004-TIOL-78-CESTAT-MUM ... Para 3.2

Hindustan Ferodo Ltd - 2002-TIOL-782-SC-MISC ... Para 3.2

Garware Nylons Ltd - 2002-TIOL-725-SC-CX ... Para 3.2

HPL Chemicals Ltd - 2006-TIOL-37-SC-CX ... Para 3.2

Surbhit Impex P Ltd - 2012-TIOL-794-CESTAT-MUM ... Para 3.2

Vijeta Textiles [2011 (268) ELT 267 (T-Ahd)]... Para 3.2

Rajdhani Timbers Products P Ltd [209 (239) ELT 188 (T-Ahd)]... Para 3.2

Alembic Ltd - 2009-TIOL-590-CESTAT-AHM ... Para 3.2

Shaf Broadcast Pvt Ltd - 2007-TIOL-45-CESTAT-MUM ... Para 3.2

Shaft Broadcast Pt Ltd - 2006-TIOL-743-CESTAT-MUM ... Para 3.2

Hi Flow Pump [2012 (282) ELT 266 (T)]... Para 3.2

Bharat Enterprises [2012 (282) ELT 226 (T)]... Para 3.2

G M Peus [2009 (247) ELT 159 (Mad)]... Para 3.2

Gaurav Enterprises - 2005-TIOL-241-HC-MUM-CUS... Para 3.2

Pure & Cure Technology - 2009-TIOL-2080-CESTAT-MUM... Para 3.3

Pure & Cure Technology - 2019-TIOL-38-CESTAT-MUM... Para 3.3

Dilip Kumar & Co - 2018-TIOL-302-SC-CUS-CB ... Para 3.3

Hotline CPT Ltd - 2015-TIOL-2889-CESTAT-DEL... Para 3.3

FINAL ORDER NO. A/87075/2019

Per: Sanjiv Srivastava:

This appeal has been filed by the appellants against the order in original No 109/2012 dated 12.10.2012 of the Commissioner Customs (Import) Nhava Sheva. By the impugned order Commissioner held as follows:

"5.1 On the basis of the foregoing, I pass the following orders:-

5.1.1. I deny the benefit of CVD exemption claimed under Sr. No.88 and Sr. No. 8C(ii) of notification No. 6/2006-CE dated 01.03.2006 (as amended) to M/s. Hitech Sweet Water Technology Pvt. Ltd. in the case of impugned goods.

5.1.2. I hold the impugned goods covered by B/E at S. No.1 to 12 having an assessable value of Rs.9,36,63,021/- (Rupees nine crore thirty six lakh sixty three thousand twenty one only) liable to confiscation under the provisions of section 111(d) and (m) of the Customs Act, 1962. However the same are not available for confiscation.

5.1.3. I confirm the demand of differential duty of Rs.71,38,777/- (Rupees seventy one lakh thirty eight thousand seven hundred seventy seven only) and order its recovery from M/s. Hitech Sweet Water Technology Pvt. Ltd., under section 28(1) of the Customs Act, 1962.

5.1.4. I confirm the demand of Rs.6,74,584/- (Rupees six lakh seventy four thousand five hundred eighty four only) being interest on the amount of duty confirmed in para 5.1.3. above and order its recovery from M/s. Hitech Sweet Water Technology Pvt. Ltd., under section 28AB of the Customs Act, 1962.

5.1.5. I impose a penalty of Rs.78,13,361/- (Rs.71,38,777/- + Rs.6,74,584/-) (Rupees seventy eight lakh thirteen thousand three hundred sixty one only) under section 114A of the Customs Act, 1962 on M/s. Hitech Sweet Water Technology Pvt. Ltd.

5.1.6. I impose a penalty of Rs.5,00,000/- (Rupees five lakhs only) under section 114AA of the Customs Act, 1962 on M/s. Hitech Sweet Water Technology Pvt. Ltd.

5.1.7. I do not impose penalty under section 112 of the Customs Act, 1962 on M/s. Hitech Sweet Water Technology Pvt. Ltd. as section 114A clearly precluded imposition of penalty under both the sections 112 and 114A of the Customs Act, 1962.

5.1.8. I also order appropriation and adjustment of the amount of Rs.83,64,390/- (Rupees eighty three lakh sixty four thousand three hundred ninety only) paid voluntarily by M/s. Hitech Sweet Water Technology Pvt. Ltd., against the differential duty, interest and/or penalty payable by them.

5.1.9. The B/E no.792603 dated 31.03.11 and 3303205 dtd. 25.04.11 having being assessed provisionally to be assessed finally denying the benefit of notification 6/2006 CE dated 01.03.2006."

2.1 On the basis of intelligence that the appellant were importing goods declared as "Filmtech Membrane (water filter parts)" by classifying them under CTH 84212190 and by claiming the duty exemption under Sr No 8C(ii) of notification No 6/2006-CE dated 01.03.2006 (as amended) [@ 5% CVD since 01.03.2011 and 4% CVD since 01.03.2010], investigations were initiated against the appellants.

2.2 Two live consignments imported vide B/E No 792603 dated 31.03.2011 for home consumption and B/E No 3303205 dated 25.04.2011 were examined and found to operate on the "Reverse Osmosis Technology" as per the product catalogue of "Dow FILMTEC Membranes" of the manufacturer Dow Europe GmbH Switzerland. These consignments were allowed provisional clearance on execution of provisional duty bond.

2.3 Investigations also revealed that in past appellants had also cleared the same goods by claiming full exemption from payment of CVD under Notification No 6/2006-CE dated 01.03.2006, Sr No 8B. This benefit is available only if the goods are-

""Water purification equipment" based on the following technologies:

- a) Ultra filtration technology using poly acrylonite; or
- b) Arsenic removal technology using organic micro filtration membrane; or
- c) Reverse osmosis technology using thin film composite membrane 9TFC); or
- d) Candle-less terracotta water filtration"

2.4 Since the imported goods were not "water purification equipment" but were the part of such equipments as these membranes by themselves were incapable of performing any water purification function themselves and had to be used along with other essential parts. Thus all the parts put together including the imported membrane would only constitute the "water purification equipment" the benefit of exemption claimed was sought to be denied to them.

2.5 Appellant being a manufacturer and trader of water purification equipments and parts thereof was fully aware of the actual use of the said imported item since the same were being used by them in manufacture of their own products. It was also noticed that they were paying the duty without availing the benefit under notification No 6/2006-CE, in respect of the same imported goods from the same supplier in past. Thus importer had misrepresented and suppressed the facts about actual nature and use of the said goods to avail undue benefit of CVD exemptions.

2.6 Appellants admitted and paid the duty along with interest due in respect of each B/E as detailed below:

Bill of Entry  
Assessable  
Duty paid in Rs  
Interest  
Number  
Date  
Value 'Rs  
On Clearance  
Differential

Paid in Rs  
687534  
29.01.10  
6850565  
824397  
812537  
126222  
757278  
24.07.10  
11309551  
1360991  
1341410  
168135  
802863  
25.08.10  
18880044  
2769565  
995485  
111484  
862263  
25.09.10  
10487020  
1759547  
746311  
73916  
939853  
09.11.10  
3333152  
559248  
237204  
19105  
604776  
13.12.10  
3425945  
574817  
243808  
16231  
648759  
07.01.11  
9533592  
1599579  
678460  
38478  
673708  
21.01.11  
10604394

1779242  
754664  
38456  
689913  
31.01.11  
3385116  
567967  
240902  
10890  
690383  
31.01.11  
9050004  
1518441  
644045  
29114  
692552  
01.02.11  
3411098  
572326  
242751  
10874  
792602  
31.03.11  
3392540  
609451  
201192  
4217  
792603  
31.03.11  
9554499  
1716412  
566623  
11876  
Total  
103217520  
16211983  
7705392  
658998

2.7 After completion of investigations a show cause notice dated 09.08.2011 was issued to the appellants asking them to show cause as to why-

- i) the exemption benefit of CVD claimed under S No 8B an S No 8C(ii) of the Notification No 6/2006CE dated 01.03.2006 (as amended), should not be denied to them;
- ii) differential amount of import duty of Rs 77,05,400/- as per calculations given in Annexure A to the SCN, should not recovered from them under section 28 of the Customs Act, 1962;

iii) the interest amount Rs 6,88,755/- should not be recovered from them under Section 28AB of the Customs Act, 1962;

iv) penalty should not be imposed under section 114A and/ or section 114AA of the Customs Act,1962 on them for knowingly committing the act of evasion of duty by way of suppression of facts;

v) the differential duty amount of Rs 77,05,392/- and interest amount rs6,58,98/ already paid by them, should not be appropriated against the differential duty Rs 77,05,400/- and interest amount of Rs 6,88,755/- calculated as per the Annexure A to the SCN.

2.8 The show cause notice was adjudicated by the Commissioner as per the impugned order referred in para 1, supra.

2.9 Aggrieved by the impugned order appellants have preferred this appeal.

3.1 We have heard Shri Sanjay Kalra, Advocate for the Appellants and Shri Ramesh Kumar, Assistant Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellants Counsel submitted that-

- they do not dispute the issue on merits but the dispute in the matter, is in respect of invocation of extended period of limitation under Section 28A and for the penalty imposed under Section 114A and 114AA of the Customs Act, 1962;

- They had not misdeclared the goods at the time of the clearance and description given by them on the B/E was same as per the invoice and packing list. Even the issue involved is no one of misdeclaration of the goods but is of in-correct availment of benefit under exemption notification No 6/2006-CE. In view of various pronouncements as follows, it cannot be inferred that they had claimed the benefit of the wrong exemption notification with intent to evade payment of duty

- Mahavir Corporation [2003 (160) ELT 355 (TBom)]

- Northern Plastic Ltd [1998(101) ELT 549 9SC] = 2002-TIOL-1889-SC-CUS

- Surbhit Impex P Ltd [2012 (283) ELT 556 TMum)] = 2012-TIOL-794-CESTAT-MUM

- N D Metals Ids Ltd [2009 (236) ELT 83 (T)] = 2008-TIOL-2860-CESTAT-MUM

- Gaurav Enterprises [2006 (193) ELT 532 (T)] = 2005-TIOL-241-HC-MUM-CUS

- Padamanabh Silk Mills [2006 (193) ELT 536 (Guj)]

- Jaramsons Plastic Industry [1993 (63) ELT 558 (T)] = 2002-TIOL-54-CESTAT-DEL-SB

- Mala Bhakatani [1993 (63) ELT 563 (T)] = 2002-TIOL-482-CESTAT-DEL

- Bajaj Health & Nutrition P Ltd [2004 (166) ELT 189 (T)] = 2004-TIOL-78-CESTAT-MUM
- Assessment is basically the job performed by the revenue as has been held in the following decisions
- Hindustan Ferodo Ltd [1997 (89) ELT 16 9SC] = 2002-TIOL-782-SC-MISC
- Garware Nylons Ltd [1996 (87) ELT 12 (SC)] = 2002-TIOL-725-SC-CX
- HPL Chemicals Ltd [2006 (197) ELT 324 (SC)] = 2006-TIOL-37-SC-CX
- They had bonafide belief in respect of admissibility of the exemption notification
- Surbhit Impex P Ltd [2012 (283) ELT 556 (TMum)] = 2012-TIOL-794-CESTAT-MUM
- Vijeta Textiles [2011 (268) ELT 267 (T-Ahd)]
- Rajdhani Timbers Products P Ltd [209 (239) ELT 188 (T-Ahd)]
- Alembic ltd [2009 (241) ELT 439 (T-Ahd)] = 2009-TIOL-590-CESTAT-AHM
- Since there was no misdeclaration and assessment was the responsibility of the revenue, extended period of limitation could not have been invoked as per the following decisions
- Shaf Broadcast Pvt Ltd [2007 (207) ELT 554 (T-Mum)] = 2007-TIOL-45-CESTAT-MUM
- Shaft Broadcast Pt Ltd [2006 (199) ELT 337 (T-Mum)] = 2006-TIOL-743-CESTAT-MUM
- Hi Flow Pump [2012 (282) ELT 266 (T)]
- Bharat Enterprises [2012 (282) ELT 226 (T)]
- G M Peus [2009 (247) ELT 159 (Mad)]
- Gaurav Enterprises [2006 (193) ELT 532 (Bom)] = 2005-TIOL-241-HC-MUM-CUS
- Goods are not liable for confiscation.
- Penalty is not imposable under Section 114A/ Section 114AA as there is no suppression or misstatement with intent to evade payment of duty.
- Interest is not payable as demand is time barred.

3.3 Arguing for the revenue learned Authorized Representative submitted while reiterating the findings in the impugned order-

- The issue is squarely covered by the decision of tribunal in case of Pure & Cure Technology [2010 (252) ELT 306 (T-Mum)] = 2009-TIOL-2080-CESTAT-MUM & - 2019-TIOL-38-CESTAT-MUM
- The appellants have admitted that they had at the time clearance of the goods, wrongly claimed the benefit exemption under Notification No 6/2006-CE and thereby short paid the duty. Thus admitting so they deposited the duty short paid along with the interest. Having done so they cannot now turn back and claim that demand is hit by limitation.
- The decisions relied upon by the appellants are not relevant as they pertain to the regime when the scheme of assessment under Custom Act, 1962 was different from what it was during the relevant period. From 2005 onwards risk assessment system was introduced and the bill of entries were system assessed without intervention of the officers of custom most of the case on a miniscule percentage of cases were referred by the system for assessment by the officer. Since scheme of assessment was entirely different during the relevant period, the judgments relied upon by the appellants for arguing limitation will not be applicable.
- Hon'ble Supreme Court has in case of Dilip Kumar & Co [2018 (361) ET 577 (SC)] = 2018-TIOL-302-SC-CUS-CB clearly held that the person claiming the benefit of exemption is required to satisfy himself and then claim the benefit of exemption. Entire responsibility in respect of exemption claimed thus is on the claimant.
- When the benefit non available exemption has been claimed extended period of limitation is applicable Hotline CPT Ltd [2016 (333) ELT 356 (T-Del)] = 2015-TIOL-2889-CESTAT-DEL

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 The issue on merits as submitted by the learned Authorized Representative is no longer res integra and covered by the decision in case of Pure & Cure Technology - 2019-TIOL-38-CESTAT-MUM wherein it has been held as follows:

"7. We find that while discarding the said argument in the impugned order, the Ld. Commissioner (Appeals) recording reasons observed that membrane no doubt play a crucial role in purifying water, but the question is one whether the membrane itself straightaway purifies the water. Then referring to the definition of equipment as defined under Oxford Dictionary, the Ld. Commissioner (Appeals) concluded that the membrane cannot be construed as water purifying equipment, accordingly not eligible to the benefit of notification. Further analyzing the classification declared by the appellant and alleged in the show cause notice, the Ld. Commissioner (Appeals) observed that the imported membrane elements merits classification under CTH 84219900 rather than 84212190 which claimed by the appellant as more specific; when the imported item was considered on article meant as purifying machinery or apparatus. We do not find any discrepancy in the observation of the Ld. Commissioner (Appeals). Hence, the same does not warrant any interference. Further we do not find merit in the contention of the appellant that the classification resorted to by the Revenue for earlier period cannot be altered subsequently and the exemption claimed by them also cannot be denied. The appellant themselves had admitted that exemption notification to the said product was inserted w.e.f.1.3.2007 mentioning through new Sr. No. 8B where the classification of sub-heading was shown

as 842121. Needless to mention to claim the benefit of an exemption, the burden lies on assessee to satisfy that their case falls within the four corners of the Notification as held by the Hon'ble Supreme Court in CC (Import) Mumbai Vs. Dilip Kumar & Company 2018 (361) ELT 577 (SC) = 2018-TIOL-302-SC-CUS-CB . In these circumstances, we do not find merit in the arguments of the appellant. Consequently, the impugned order is upheld and the appeal is dismissed."

4.3 Further we find that during the course of investigation appellants have on their own volition deposited the duty short paid as per the challans on the dates indicated below:

Bill of Entry

Challan Date

Differential Duty paid in Rs

Interest Paid in Rs

Number

Date

687534

29.01.10

24.06.2011

812537

126222

757278

24.07.10

24.05.2011

1341410

168135

802863

25.08.10

23.05.2011

995485

111484

862263

25.09.10

23.05.2011

746311

73916

939853

09.11.10

23.05.2011

237204

19105

604776

13.12.10

23.05.2011

243808

16231

648759

07.01.11  
24.05.2011  
678460  
38478  
673708  
21.01.11  
24.05.2011  
754664  
38456  
689913  
31.01.11  
20.05.2011  
240902  
10890  
690383  
31.01.11  
20.05.2011  
644045  
29114  
692552  
01.02.11  
20.05.2011  
242751  
10874  
792602  
31.03.11  
20.05.2011  
201192  
4217  
792603  
31.03.11  
20.05.2011  
566623  
11876  
Total

7705392  
658998

4.4 In his statement recorded under Section 108 of Customs Act, 1962 on 20.07.2011, Shri Vijay Shobhalal Shah, Managing Director of the Appellant stated as follows:

"However the imported goods are not apparatus or equipment by itself and it is only part of the water purification equipment/apparatus. I claimed the benefit of the aforesaid notification by oversight. However we also admit that the goods are (said membrane) not eligible for benefit of the said notification that's why we have all ready paid the differential duty with interest as applicable. I .... that we have not misdeclared anything, we have already admitted that we are not eligible for above

notification and that's why we paid duty and interest and we do not wish to claim any refund also of the differential duty and interest, as per Annexure A."

4.5 In our view once the appellants have paid duty and interest and have admitted their liability they are barred in subsequent proceedings, to claim the benefit of limitation in respect of the amounts so paid. Discussing the principle of Estoppel, Hon'ble Supreme Court has in case of B.L. Sreedhar & Ors vs K.M. Munireddy (Dead) And Ors [AIR 2003 SC 578] held as follows-

"Estoppel is a rule of evidence and the general rule is enacted in Section 115 of the Indian Evidence Act, 1872 (in short 'Evidence Act') which lays down that when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. [See Sunderabai and Anr. v. Devaji Shankara Deshpande (AIR 1954 SC 82)].

"Estoppel is when one is concluded and forbidden in law to speak against his own act or deed, yea, though it be to say the truth" Co.Litt., 352(a), cited in Ashpital v. Byron, 3B and S. 474(489); Simon v. Anglo American Telegraph Co., (1879) 5 Q.B.D. 188 C.A., per Bramwell L.J. at p. 202; Halsbury, Vol. 13, Para 488. So there is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it be true or not. Estoppel, or conclusion, as it is frequently called by the older authorities, may therefore be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. Halsbury, Vol. 13, para. 448. The rule on the subject is thus laid down by Lord Denman, in Pickard v. Sears, 6 Ad. & E. 469 at p. 474: "But the rule is clear, that, where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act to that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." "The whole doctrine of estoppel of this kind, which is fictitious statement treated as true, might have been founded in reason, but I am not sure that it was. There is another kind of estoppel - estoppel by representation- which is founded upon reason and it is founded upon decision also." Per Jessel, M.R. in General Finance & Co. v. Liberator, L.R. 10 Ch.D.15(20). See also in Simon v. Anglo-American Telegraph Co., L.R. 5 Q.B.D.202 Bramwell, L.J. said" An estoppel is did to exist where a person is compelled to admit that to be true which is not true and to act upon a theory which is contrary to the truth."

On the whole, an estoppel seems to be when, in consequences of some previous act or statement to which he is either party or privy, a person is precluded from showing the existence of a particular state of facts. Estoppel is based on the maxim, *allegans contrarium non est audiendus* (a party is not be heard to allege the contrary) and is that species of presumption *juries et de jure*- (absolute or conclusive or irrebutable presumption), where the fact presumed is taken to be true, not as against all the world, but against a particular party, and that only by reason of some act done; it is in truth a kind of *argumentum ad hominem*.

"In our old law books," said Mr.Smith in his notes to the Duchess of Kingston's case, "truth appears to have been frequently shut out by the intervention of an estoppel, where reason and good policy required that it should be admitted.... However, it is in no wise unjust or unreasonable, but, on the

contrary, in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law, for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act."

"An estoppel is not a cause of action- it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself." Per Lindley L.J. in *Low v. Bouveria*, (1831) 3 Ch. 82 at p.101. In the same case, at p.105. Bowen L.J. added: " Estoppel is only a rule of evidence; you cannot found an action upon estoppel."

Estoppel though a branch of the law of evidence is also capable of being viewed a substantive rule of law in so far as it helps to create or defeat rights, which would not exist or be taken away but for that doctrine.

Estoppel is a complex legal notion, involving a combination of several essential elements statement to be acted upon, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly viewed as a substantive rule of law... Estoppel is different from contract both in its nature and consequences. But the relationship between the parties must also be such that the imputed truth of the statement is a necessary step in the constitution of the cause of action. But the whole case of estoppel fails if the statement is not sufficiently clear and unqualified" (per Lord Wright in *Canada & Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamships Ltd.* (1946) 3 W.W.R. 759 at p. 764).

"The essential factors giving rise to an estoppel are, I think-

"(a) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation was made.

"(b) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation was made.

"(c) Detriment to such person as a consequence of the act or omission where silence cannot amount to a representation, but, where there is a duty to disclose, deliberate silence may become significant and amount to a representation. The existence of a duty on the part of a customer of a bank to disclose to the bank his knowledge of such a forgery as the one in question was rightly admitted." (Per Lord Tomlin, *Greenwood v. Martins Bank* (1933) A.C.51.) See also *Thompson v. Palmer*, 49 C.L.R. 547; *Grundt v. Great Boulder*, 59 C.I.R.675; *Central Newbury Car Auctions v. Unity Finance* (1957)1 Q.B.371SD.MN "Estoppel,' commeth of a French word "estoupe", from whence the English word stopped, and it is called an estoppel, or conclusion, because a man's owne act or acceptance stoppeth or closeth up his mouth to allege or plead the truth; and Littleton's case proveth this description" (Co.Litt.352 a, where it is said estoppel is of three kinds, i.e., matter (1) of record, (2) in writing, i.e, semble, by deed, (3) in Pais). To the same effect is the definition in *Termes de la Ley*. (See *Stroud's Judicial Dictionary*, Fourth Edition, Page 943).

"An estoppel," says Lord Coke, "is where a man is concluded by his own act or acceptance to say the truth." Mr. Smith, in his note to the *Duchess of Kingston's* case, characterizes this definition as a little startling but it nevertheless gives a good idea of what it is, by no means easy to include within the

limits of a definition. (1 Smith L.C. 760) Though estoppel is described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. An estoppel, which enables a party as against another party to claim a right of property which in fact he does not possess is described as estoppel by negligence or by conduct or by representation or by holding out ostensible authority.

Estoppel, then, may itself be the foundation of a right as against the person estopped, and indeed, if it were not so, it is difficult to see what protection the principle of estoppel can afford to the person by whom it may be invoked or what disability it can create in the person against whom it operates in cases affecting rights. Where rights are involved estoppel may with equal justification be described both as a rule of evidence and as a rule creating or defeating rights. It would be useful to refer in this connection to the case of *Depuru Veeraraghava Reddi v. Depuru Kamamma*, (AIR 1951 Madras 403) where Vishwanatha Sastri, J., observed:

"An estoppel though a branch of the law of evidence is also capable of being viewed as a substantive rule of law in so far as it helps to create or defeat rights which would not exist and be taken away but for that doctrine."

Of course, an estoppel cannot have the effect of conferring upon a person a legal status expressly denied to him by a statute. But where such is not the case a right may be claimed as having come into existence on the basis of estoppel and it is capable of being enforced or defended as against the person precluded from denying it.

In his illustrious book "Law of Estoppel" 6th Edition, Bigelow has noted as follows:

"Situations may arise, indeed, in which a contract should be held an estoppel, as in certain cases where only an inadequate right of action would, if the estoppel were not allowed, exist in favour of the injured party. In such a case the estoppel may sometimes be available to prevent fraud and circuity of action."

In another illustrious book "Estoppels and the Substantive Law" by Arthur Caspersz under title 'Conduct of Indifference or Acquiescence' it has been noted as follows:

"40. It is, however, with reference to the third class of cases that the greatest difficulty has arisen, especially where statements have been made, expressly or by implication, which cannot properly be characterized as representations at all. It must now be regarded as settled that an estoppel may arise as against persons who have not willfully made any misrepresentation, and whose conduct is free from fraud or negligence, but as against whom inferences may reasonably have been drawn upon which others may have been induced to act.

The doctrine of Acquiescence may be stated thus:

"If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act." (*Duke of Leeds v. Earl of Amherst* 2

Ph. 117 (123) (1846). This is the proper sense of the term acquiescence, "and in that sense may be defined as acquiescence, under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct." (De Bussche v. Alt. L.R. 8 Ch.D. 286 (314). Acquiescence is not a question of fact but of legal inference from facts found. (Lata Beni Ram v. Kundan Lall, L.R. 261 I.A. 58 (1899).

The common case of acquiescence is where a man, who has a charge or incumbrance upon certain property, stands by and allows another to advance money on it or to expend money upon it. Equity considers it to be the duty of such a person to be active and to state his adverse title, and that it would be dishonest in him to remain willfully passive in order to profit by the mistake which he might have prevented. (Ramsden v. Dyson L.R. 1 E & I, Ap. 129(140)(1865).

x x x x x

42. In such cases the conduct must be such that assent may reasonably be inferred from it. The doctrine of acquiescence has, however, been stated to be founded upon conduct with a knowledge of legal rights, and as stated in some cases appears to imply the existence of fraud on the part of the person whose conduct raises an estoppel. The remarks of the Judicial Committee, however, in Sarat Chunder Dey v. Gopal Chunder Laha, (L.R. 19 I.A. 203) clearly extend the doctrine of estoppel by conduct of acquiescence or indifference to cases where no fraud whatever can be imputed to the person estopped, and where that person may have acted bona fide without being fully aware, either of his legal rights, or of the probable consequences of his conduct. In every case, as already pointed out, the determining element is not the motive or the state of knowledge of the party estopped, but the effect of his representation or conduct as having induced another to act on the faith of such representation or conduct.

Lapse of time and delay are most material when the plaintiff, by his conduct may be regarded as waiving his rights, or where his conduct, though not amounting to a waiver, has placed the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards asserted. When, however, an argument against a relief, otherwise just, is founded upon mere delay not amounting to bar by limitation, the validity of that defence must be tried by principles substantially equitable."

In Snell's Principles of Equity, 27th Edition, Chapter 3, 12 Maxims of Equity have been indicated. Of these maxims principles 5, 6 and 7 are relevant for the purpose of the case in hand. They are as follows:

x x x x

"5. He who seeks equity must do equity.

6. He who comes into equity must come with clean hands.

7. Delay defeats equities, or, equity aids the vigilant and not the indolo Vigilantibus, non dormientibus, jura subveniunt."

x x x x The following passage from the "Law relating to Estoppel by Representation" by George Spencer, Second Edition as indicated in Article 3 is as follows:-

"It will be convenient to begin with a satisfactory definition of estoppel by representation. From a careful scrutiny and collation of the various judicial pronouncements on the subject, of which no single one is, or was perhaps intended to be, quite adequate, and many are incorrect, redundant, or slipshod in expression; the following general statement of the doctrine of estoppel by representation emerges; where one person ("the representor") had made a representation to another person ("the representee") in words or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representor at the proper time, and in the proper manner, objects thereto."

In Article 1175 at page 637 of Halsbury's Laws of England, 3rd Edition, Volume 14, it is stated as follows:

"Waiver is the abandonment of a right, and is express or implied from conduct. A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision may waive it....."

"The essence of waiver is "estoppel" and where there is no "estoppel" there can be no "waiver", the connection between "estoppel" and "waiver" being very close. But, in spite of that, there is an essential difference between the two and that is whereas estoppel is a rule of evidence waiver is a rule of conduct. Waiver has reference to man's conduct, while estoppel refers to the consequences of that conduct."

A few decisions of this Court which have illuminatingly dealt with the concept of estoppel may be noted.

In *S. Shanmugam Pillai v. K. Shanmugam Pillai* (AIR 1972 SC 2069) it was observed that there are three classes of estoppels that may arise for consideration in dealing with reversioner's challenge to a widow's alienation. They are (1) that which is embodied in S.115 of the Evidence Act, (2) election in the strict sense of the term whereby the person electing takes a benefit under the transaction, and (3) ratification i.e. agreeing to abide by the transaction. A presumptive reversioner coming under any one of the aforesaid categories is precluded from questioning the transaction, when succession opens and when he becomes the actual reversioner. But if the presumptive reversioner is a minor at the time he has taken a benefit under the transaction, the principle of estoppel will be controlled by another rule governing the law of minors. If after attaining majority he ratifies the transaction and accepts the benefit thereunder, there cannot be any difference in the application of the principle of election. The effect would be the same. It may be that on attaining majority he has the option to disown the transaction and disgorge the benefit or to accept it and adopt it as his own. Whether after attaining majority the quondam minor accepted the benefit or disowned it, is a question to be decided on the facts of each case.

In *Provash Chandra Dalui v. Biswanath Banerjee* (AIR 1989 SC 1834), it was observed as follows:

"21. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right. It means the forsaking the assertion of a right at the proper opportunity. The first respondent filed suit at the proper opportunity after the land was transferred to him, and no covenant to treat the appellants as Thika tenants could be shown to have run with the land. Waiver is distinct from estoppel in that in waiver the essential element is actual intent to abandon or surrender right, while in estoppel such intent is immaterial. The necessary condition is the detriment of the other party by the conduct of the one estopped. An estoppel may result though the party estopped did not intend to lose any existing right. Thus voluntary choice is the essence of waiver for which there must have existed an opportunity for a choice between the relinquishment and the conferment of the right in question. Nothing of the kind could be proved in this case to estop the first respondent."

In *Indira Bai v. Nand Kishore* (1990 (4) SCC 668), it was observed as follows:

"Estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates as a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to aid the law in administration of justice. But for it great many injustice may have been perpetrated. Present case is a glaring example of it. True no notice was given by the seller but the trial court and the appellate court concurred that the pre-emptor not only came to know of the sale immediately but he assisted the purchaser-appellant in raising construction which went on for five months. Having thus persuaded, rather mislead, the purchaser by his own conduct that he acquiesced in his ownership he somersaulted to grab the property with constructions by staking his own claim and attempting to unsettle the legal effect of his own conduct by taking recourse to law. To curb and control such unwarranted conduct the courts have extended the broad and paramount considerations of equity, to transactions and assurances, express or implied to avoid injustice."

If a man either by words or by conduct has intimated that he consents to an act which has been done and that he will not offer any opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that which they otherwise might have abstained from, he cannot question legality of the act he had sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

Thus in view of the statement made by the Appellant admitting the differential duty liability in respect of each of 13 Bill of Entries, after making the payment, in our view the appellants are barred from taking any stand contrary to what has admitted by them. The fact that statement has been recorded nearly two months after the act of actual deposit the statement is voluntary, in absence of any retraction of the same. Hence we do not find any merits in submission made by the Appellant in respect of the differential duty confirmed along with interest.

4.6 Section 28 (2) of the Customs Act, 1962, reads as follows:

"(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty or

interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest:"

In terms of this sub section, when the son has admitted duty liability and had paid the same along with the interest due, the proceedings should have been abated against that person. In our view it is not the case of willful misstatement, suppression or mis-declaration, but a case of bonafide error in claiming the benefit of exemption which was not due to them, we do not find any merits in the penal proceedings undertaken against them. Appellants had in the Bill of Entries, clearly described the imported goods, declaring them to be "Filmtec Membrane 70078, TW30-1812-75 (Water Filter Parts)", "Filmtec Membrane 70075, TW30-1812-50 (Water Filter Parts)", "Filmtec Membrane 70195, BW30-7095 (Water Filter Parts)", "Filmtec Membrane 70034, BW30-365 (Water Filter Parts)", "Filmtec Membrane 70195, BW30-4040 (Water Filter Parts)", "Filmtec Membrane 70037, BW30-400 (Water Filter Parts)" and "Filmtec Membrane 11357, BW30LE-4040 (Water Filter Parts)". Since appellants have clearly and correctly described the imported goods as part of water filter, the error in claiming the benefit of wrong exemption notification cannot be act of deliberate misdeclaration. Hence we do not find any merits in the order of Commissioner imposing penalty on the appellants under Section 114A.

5.1 In view of discussions as above, we partly allow the appeal and set aside the penalties imposed on the Appellant under Section 114A or Section 114AA of the Customs Ac, 1962. With the above modification the impugned order is upheld.