

In the High Court of Judicature at Madras

Dated : 03.3.2016

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN

and

The Honourable Mr.Justice N.KIRUBAKARAN

Civil Miscellaneous Appeal No.973 of 2008 and MP.No.1 of 2008

M/s.Eveready Industries India Ltd.,
Chennai-19.

...Appellant/Respondent

Vs

1.The Customs, Excise and Service
Tax Appellate Tribunal, South
Zonal Bench, Chennai-6.

2.The Assistant Commissioner of
Central Excise, 'C' Division, Chennai I
Central Excise Commissionerate,
Chennai-34.

3.The Commissioner of Central Excise,
Chennai I Central Excise Commissionerate,
Chennai-34.

...Respondents/Appellants

APPEAL under Section 35G of the Central Excise Act, 1944 against the order dated 19.9.2007 made in final order No.1173/07 against the order of the Commissioner of Central Excise (Appeals) Chennai, 600 034 dated 29.2.2000 in Appeal No.45/2000 (M-1) and against the Order of the Assistant Commissioner of Central Excise -C- Division Chennai-I Commissionerate 121 Mahatma Gandhi Road, Nungambakkam Chennai-34 dated 21/06/1999 in C.No.IV/10/48/98/RF on the file of the first respondent herein.

For Appellant : Mr.Raghavan Ramabadran for
Ms.Lakshmi Kumaran RI-Tribunal

For Respondents 2 & 3 : Mr.Rajnish Pathiyil, Standing
Counsel

COMMON JUDGMENT

(Judgment was delivered by V.RAMASUBRAMANIAN,J)

This appeal is filed by the assessee under Section 35G of the Central Excise Act, 1944 against the order of the Customs, Excise and Service Tax Appellate Tribunal, reversing the decision of the Commissioner (Appeals) and restoring the order of the Original Authority.

2. Heard Mr.Raghavan Ramabadran, learned counsel for the appellant/ assessee and Mr.Rajnish Pathiyil, learned Standing Counsel for respondents 2 and 3.

3. On 19.3.2008, the above appeal was admitted on the following substantial question of law :

"Whether the first respondent is right in holding that as per para No.95 of the decision of the Apex Court in the case of Mafatlal Industries Ltd. Vs. UOI [1997 (89) ELT 247 (SC)] if the provisional assessment finalisation orders passed under Rule 9B(5) of the Central Excise Rules, 1944 are appealed against and are allowed, then any refund claim arising as a consequence of the decision in appeal would be governed by Section 11B of the Central Excise Act, 1944 even when the order of the Appellate Authority is also the order of finalisation of provisional assessment ? i.e. where the appellate order is a continuation of finalisation of the provisional assessment (vide para No.7 of the impugned order) ?"

4. However, when the appeal came up for hearing on 23.4.2015, this Court framed an additional substantial question of law to the following effect:

"Whether the first respondent is right in holding that there can be a demand notice under Section 11A of the Central Excise Act, 1944 by the Original Authority for alleged erroneous refund (earlier granted by the same Original Authority) without reviewing at all the refund order of the Original Authority by the Superior Authority in terms of Section 35E of the Act *ibid* (vide para No. 6 of the impugned order) ? "

5. Mr.Raghavan Ramabadran, learned counsel for the appellant/ assessee submitted that he is not pressing the substantial question of law that was framed on 19.3.2008. This is recorded.

6. Therefore, the only question that survives for our consideration today is the question that was additionally framed on 23.4.2015.

7. Brief facts that led to the filing of the above appeal can be summarily stated as follows :

(i) The appellant is the manufacturer of dry cell batteries and they were clearing the goods on payment of duty on a provisional basis as per Rule 9B of the Central Excise Rules, 1944 by executing a bond with security in the form of bank guarantee.

(ii) In order to finalise the assessment, the Assistant Commissioner issued a notice. Different issues were raised and they were explained by the assessee. One of the points, on which, the Assistant Commissioner focussed was the cash discount allowed by the assessee to the customers on a certain percentage, for which, an abatement was claimed from the list price. The Original Authority passed an order on 22.12.1997 disallowing the claim for abatement and rejecting the claim for refund to the extent of Rs.12,20,000/-.

(iii) As against the said order, the assessee filed an appeal before the Commissioner (Appeals). In the appeal, the assessee relied upon a circular of the Ministry of Finance bearing F.No.312/1/75-Cx.10 dated 8.8.1975 wherein the question of cash discount was explained.

(iv) The circular stated that discounts for prompt payment of price of goods on delivery were admissible in arriving at the assessable value, if they were available to all buyers. Accepting the same and after recording a finding that the cash discount was made available by the assessee uniformly to all customers, the Commissioner (Appeals) passed an order dated 3.4.1998 holding that the Original Authority committed a mistake in holding that the cash discounts are restricted to certain cases, wherever passed on.

(v) On that basis, the Appellate Authority set aside the Order in Original. It is relevant to mention that the Appellate Authority relied upon two decisions of the Bombay High Court, one in Jhenson & Nicholson (India) Ltd. Vs. Union of India [1984 (17) ELT 4] and Goodlass Nerolac Paints Limited Vs. Union of India [1993 (65) ELT 186]. Without reference to the order of the

Commissioner (Appeals), the Assistant Commissioner finalised the provisional assessment by an order dated Nil/4/1998, including a sum of Rs.9,30,499/- towards cost of distribution and interest on inventory and arrived at the refund to be made to the extent of Rs.12,61,864/-.

(vi) Thereafter, the appellant filed an application for refund and by the proceedings of the second respondent dated 29.9.1998, the appellant was informed of the sanction accorded by the Assistant Commissioner for the refund of a sum of Rs.3,31,365/-.

(vii) In the meantime, the assessee filed an appeal against the finalisation of assessment made on Nil/4/1998, but the same was closed by the Commissioner (Appeals) by an order dated 30.11.1998 in view of the refund order already passed.

(viii) Thereafter, a show cause notice dated 24.3.1999 was issued by the very same Assistant Commissioner, who accorded sanction for refund in terms of Section 11A, holding that there was an erroneous refund of Rs.3,31,365/-. This was followed by an Order in Original dated 21.6.1999 directing the recovery of the refund already made. This Order in Original having been confirmed by the Commissioner (Appeals) by an order dated 29.2.2000 and by the Tribunal by an order dated 19.9.2007, the assessee is before us.

8. In the background of the above facts, the main thrust of the argument of the learned counsel for the appellant/assessee is that after having allowed the order of the Commissioner (Appeals) dated 3.4.1998 to attain finality and without even taking recourse to the procedure available under Section 35E(2), it is not open to the Department to take recourse to Section 11A.

9. The response of the Department to this contention is that Section 11A and Section 35E are two different provisions, which operate in different fields and that wherever there is erroneous refund, the same can always be recovered by initiating proceedings under Section 11A without taking recourse to the provisions of Section 35E.

10. It is on account of these rival contentions, this Court thought it fit to frame the additional question of law on 23.4.2015, which alone now survives for adjudication.

11. In order to understand the scope of the rival contentions, it is necessary to have a look at Sections 11A and 35E.

12. Section 11A reads as follows :

"Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. -

(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-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 of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if, for the words one year, the words "five years" were substituted :

Provided further that where the amount of duty which has not been levied or paid or has been short levied or short paid or erroneously refunded is one crore rupees or less a notice under this Sub-Section shall be served by the Commissioner of Central Excise 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 paid or has been short levied or short paid or erroneously refunded is more than one crore

rupees, no notice under this Sub-Section shall be served without the prior approval of the Chief Commissioner of Central Excise.

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 five years, as the case may be.

(2) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under Sub-Section (1), determine the amount of duty of excise 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 this Section, —

(i) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) "relevant date" means, —

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid —

(A) where under the rules made under this Act a periodical return, showing particulars of the duty paid on the excisable goods removed during the period to which the said return relates, is to be filed by a manufacturer or a producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;]

(B) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;

(b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund."

13. Section 11A(1) prescribes the procedure for recovery of any duty of excise, which is either not levied or not paid or which has been short-levied or short-paid or which has been erroneously refunded. The recovery of such amounts can be made under Section 11A(1), irrespective of whether such non levy or non payment or short levy or short payment or erroneous refund was on the basis of any approval, acceptance or assessment relating to the rate of duty or on valuation of excisable goods under any other provisions of this Act or Rules made thereunder. Section 11A(1), as it stood before 12.5.2010, prescribed the period of limitation of six months from the relevant date for the initiation of any action for recovery under the said provision. But, with effect from 12.5.2010, the period of limitation has been enhanced from six months to one year under Finance Act, 2000.

14. Section 35E, which confers power upon the Board as well as the Commissioner of Excise to pass certain orders, reads as follows :

"Powers of Board or Commissioners of Central Excise to pass certain orders. -

(1) The Board may, of its own motion, call for and examine the record of any proceeding in which a Commissioner of Central Excise as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order.

(2) The Commissioner of Central Excise may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him

has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Central Excise in his order.

(3) No order shall be made under Sub-Section (1) or Sub-Section (2) after the expiry of one year from the date of the decision or order of the adjudicating authority.

(4) Where in pursuance of an order under Sub-Section (1) or Sub-Section (2) the adjudicating authority or the authorised officer makes an application to the Appellate Tribunal or the Commissioner (Appeals) within a period of three months from the date of communication of the order under Sub-Section (1) or Sub-Section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals), as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the provisions of Sub-Section (4) of Section 35B shall, so far as may be, apply to such application.

(5) The provisions of this Section shall not apply to any decision or order in which the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment of any duty is in issue.

Explanation - For the purposes of this Sub-Section, the determination of a rate of duty in relation to any goods or valuation of any goods for the purposes of assessment of duty includes the determination of a question-

(a) relating to the rate of duty of excise for the time being in force, whether under the Central Excise Tariff Act, 1985 (5 of 1986), or under any other Central Act providing for the levy and collection of any duty of excise, in relation to any goods on or after the 28th day of February 1986; or

(b) relating to the value of goods for the purposes of assessment of any duty of excise in cases where the assessment is made on or after the 28th day of February 1986; or

(c) Whether any goods or excisable goods or whether the rate of duty of excise on any goods is nil; or

(d) whether any goods fall under a particular heading or sub-heading of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), or the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), or the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), or that any goods are or not covered by a particular notification or order issued by the Central Government or the Board, as the case may be, granting total or partial exemption from duty; or

(e) whether the value of any goods for the purposes of assessment of duty of excise shall be enhanced or reduced by the addition or reduction of the amounts in respect of such matters as are specifically provided in this Act."

15. As could be seen from Sub-Section (2) of Section 35E, the Commissioner of Central Excise has a suo motu power of revision, to call for and examine the record of any proceedings, in which, an Adjudicating Authority, subordinate to him, has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order.

16. Interestingly, the power of revision under Sub-Section (2) of Section 35E is not a normal power of revision, under which, the Revisional Authority could, by itself, correct the error on the part of the Subordinate Officer. The power

available under Sub-Section (2) of Section 35E is a limited power and that power extends only to a direction to such Authority to apply to the Commissioner (Appeals) for determination of such points.

17. In other words, the power of revision available under Section 35E(2) is limited to the extent of directing the Authority to file an appeal to the Commissioner (Appeals) for the determination of the issues. But, even the limited power under Sub-Section (2) of Section 35E can be exercised only within the period of limitation prescribed under Sub-Section (3). Sub-Section (3) prescribes a period of limitation of one year. This period of one year is available from the year 1984, as it was introduced under Finance Act, 1984.

18. Sub-Section (5) of Section 35E carves out an exception to the power available under Sub-Sections (1) and (2). It says that the provisions of the Section will not apply to certain types of decisions or orders, in which, the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purpose of assessment of any duty is in issue or is one of the points in issue.

19. There is an Explanation under Sub-Section (5), which indicates the circumstances that would be taken into account for the determination of a rate of duty in relation to any goods or valuation of any goods. Clause (e) under the Explanation states that the question as to whether the value of any goods for the purposes of assessment of duty of excise shall be enhanced or reduced by the addition or reduction of the amounts in respect of such matters as are specifically provided in the Act, will be deemed to be an issue relating to the determination of a rate of duty.

20. We have dealt with Sub-Section (5) and the Explanation thereunder, since an argument has been advanced on the basis of the same by Mr. Rajnish Pathiyil, learned Standing Counsel for the Department, despite the fact that Sub-Section (5) and the Explanation thereunder, though inserted by Section 11 of the Customs and Central Excise Laws (Amendment) Act, 1988, got repealed in 2004.

21. In support of his contention that Sections 11A and 35E are independent of each other, Mr. Rajnish Pathiyil, learned Standing Counsel for the Department cited the following decisions :

(i) Union of India Vs. Jain Shudh Vanaspathi Ltd. [(1996) 86 ELT 460 (SC)]

(ii) Asian Paints (India) Limited Vs. Collector of Central Excise [(1994) 54 ECR 173 (FB of the Tribunal)]

(iii) Asian Paints (India) Limited Vs. Collector of Central Excise [(2002) 142 ELT 522 (SC)]

(iv) Sivananda Pipe Fittings Ltd. Vs. Superintendent of Central Excise [(1998) 97 ELT 52 (Madras)]

(v) Commissioner of Central Excise Vs. Gillooram Gaurishankar [MANU/JH/0088/2002]

(vi) Commissioner of Central Excise Vs. PRICOL Ltd. [(2015) 320 ELT 703 (Madras)] and

(vii) Commissioner of Customs & Central Excise Vs. Panyam Cements & Minerals Industries Ltd. [(2016) 331 ELT 206 (AP)].

22. In contrast, Mr. Raghavan Ramabadran, learned counsel for the appellant/assessee placed strong reliance upon the judgment of this Court in Madurai Power Corporation Vs. DCCE [(2008) 229 ELT 521].

23. Before we look into the decisions relied upon by the learned counsel on both sides, it would be appropriate to recollect the facts that we have left far behind. As we have stated earlier, the Order in Original, passed in 22.12.1997, covered various issues, one of which related to abatement towards cash discounts. The Original Authority followed the decision of the Supreme Court in Addison & Co. Ltd. [(1997) 91 ELT 532], wherein it was held that turnover discount was an admissible abatement and should be known at the time of removal. This Order in Original was set aside by the Commissioner (Appeals) by the order dated 3.4.1998. In the said order, the Appellate Authority recorded a finding of fact to the effect that the cash discount was allowed by the appellant/assessee uniformly to all customers (paragraph 4 of the order dated 3.4.1998 of the Commissioner). As a consequence, the Commissioner (Appeals) held that the cash discount became an admissible deduction irrespective of whether the discount was availed or not.

24. After referring to two decisions of the Bombay High Court, the special leave petition, against one of which, had also been dismissed by the Supreme Court, the Commissioner (Appeals) held that the Original Authority was wrong in stating that the cash discounts were restricted to the cases wherever passed on. The said order of the Commissioner (Appeals) attained finality. Though, without reference to the order of the Commissioner (Appeals), the Original Authority finalised the

assessment by his order dated Nil/4/1998 and made a demand for duty, the Original Authority subsequently allowed the application for refund filed under Section 11B and directed refund to the tune of Rs.3,31,365/-.

25. On the basis of the refund so ordered, the appeal filed for a second time by the assessee as against the finalisation of the assessment by the Original Authority by his order dated Nil/4/1998, came to be closed in order in Appeal No.206/98 dated 30.11.1998.

26. It is relevant to note that at the time when the second time appeal in Appeal No.206/98 was decided, the refund had already been made on 29.9.1998. But, the Department did not choose to contend that the appeal still survives and there was a re-thinking on their part to invoke the power under Section 11A.

27. In other words, by their failure to bring it to the notice of the Commissioner (Appeals) at the time when Appeal No.206/98 came up for hearing and decided on 30.11.1998, the Department lulled the assessee into a sense of false security about the refund already made on 29.9.1998. This is an aspect, which we should keep in mind before we deal with the rival contentions on the interplay between Sections 11A and 35E. It is only after the closure of the appeal filed by the appellant against the finalisation of assessment that a show cause notice was issued on 24.3.1999 invoking the provisions of Section 11A. The Original Authority, the Appellate Authority as well as the Tribunal applied the strict letter of the law and found that since both these provisions can exist independent of each other, the show cause notice was in accordance with the provisions of law and unassailable.

28. But, a careful look at the scheme of Sections 11A, 11B and 35E would show that an application for refund is not to be dealt with merely as a ministerial act or an administrative act. Under Section 11B of the Act, a person, claiming refund of any duty of excise and interest already paid, should make an application in the prescribed form. Such application is to be made within the period of limitation prescribed under Sub-Section (1) of Section 11B. The application should be accompanied by such documentary or other evidence, in relation to which, such refund is claimed. Sub-Section (2) of Section 11B mandates that upon receipt of any application for refund, the Assistant Commissioner or Deputy Commissioner, if he is satisfied that the duty is refundable, should make an order. The refund order is capable of being given effect to in several methods including adjustment or rebate of duty of excise, all of which are prescribed in Clauses (a) to (f) under the Proviso to Sub-Section (2) of Section 11B.

29. Sub-Section (3) of Section 11B, which contains a non-obstante clause, makes it clear that de hors any judgment, decree, order or direction of the Appellate Tribunal or any court or any other provisions of the Act, no refund shall be made except as provided by Sub-Section (2).

30. Therefore, the detailed procedure prescribed under Section 11B not only regulates the manner and form, in which, an application for refund is to be made, but also prescribes a period of limitation, method of adjudication as well as the manner, in which, such refund is to be made. In simple terms, Section 11B is a complete code in itself.

31. Therefore, it is clear that what is required of an Assistant Commissioner or Deputy Commissioner under Sub-Section (2) of Section 11B is to adjudicate upon the claim for refund. The expression 'Adjudicating Authority' is also defined in Section 2(a) to mean any Authority competent to pass any order or decision under this Act, but does not include the Central Board, Commissioner of Excise (Appeals) or the Appellate Tribunal. Hence, the power exercised under Section 11B is that of an Adjudicating Authority and the order passed is certainly one of adjudication.

32. It is only when an order of adjudication is passed under Section 11B that a person, who makes a claim for refund, will get his money back. This assumes significance in the light of the fact that by the proceedings dated 29.9.1998, the appellant/assessee was informed of the sanction granted by the Assistant Commissioner to make a refund of a sum of Rs.3,31,365/- arising as a consequence of the finalisation of assessment.

33. In simple terms, the refund that the appellant got was and should have been only after an adjudication under Section 11B and not without an adjudication. It must be pointed out that if an Authority has done something, it must be presumed that he has done it in accordance with law. Therefore, we would give the benefit of doubt to the Assistant Commissioner and presume that before according sanction in September 1998 for refund, he had actually followed the procedure under Section 11B and passed an order of adjudication.

34. Once it is seen that an order of adjudication has been validly passed under Section 11B and a refund has also been made on 29.9.1998, then the next question that would fall for consideration is as to whether Section 11A can be invoked

thereafter. We have already extracted the provisions of Section 11A. Interestingly, the authority, given under Section 11A(1) for recovery of any refund erroneously paid, is upon the Central Excise Officer. The expression used in Clause (a) in Sub-Section (1) of Section 11A is 'Central Excise Officer'.

35. The expression 'Central Excise Officer' is defined in Section 2(b) to mean the Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of a Central Excise Officer under this Act.

36. Therefore, an order of recovery can be passed under Section 11A even by an Assistant Commissioner, as he happens to be a Central Excise Officer in terms of Clause (a) in Sub-Section (1) of Section 11A. In contrast, the processing of an application and the passing of an order on an application for a refund, can be made either by the Assistant Commissioner or by the Deputy Commissioner under Sub-Section (2) of Section 11B. Hypothetically, it would mean that a Deputy Commissioner can pass an order for refund under Section 11B(2) and an Assistant Commissioner can invoke the proceedings for recovery under Section 11A(1).

37. In other words, by reading the provisions of Section 11A in such a manner as the learned Standing Counsel would request us to do, we would be recognizing a power in a Subordinate Authority to invoke the power of recovery under Section 11A, despite the fact that a refund application has been adjudicated upon by a Superior Authority under Section 11B. We should keep this fact in mind before dealing with the interplay between Sections 11A and 35E.

38. As we have seen from the language employed in Section 35E, which we have extracted above, a limited revisional jurisdiction is conferred upon the Principal Commissioner and Commissioner of Excise in Sub-Section (2) of Section 35E. This power is not actually to correct any error directly, on the part of an Adjudicating Authority. This power is available only for directing the Competent Authority to take the matter to the Commissioner (Appeals).

39. Therefore, it was always open to the Principal Commissioner or the Commissioner of Central Excise to examine the order of the Adjudicating Authority namely the Assistant

Commissioner in the proceedings under Section 11B and to give a direction to the Competent Authority to file an appeal against the order of refund under Section 11B, to the Commissioner of Appeals under Section 35. This was not done in this case. On the contrary, the Authorities allowed the order to be passed in Appeal No.206/98 dated 30.11.1998 on the basis of the refund already made.

40. Now, coming to the decisions, on which, heavy reliance is placed by the learned Standing Counsel for the Department, it is seen from the decision of the Supreme Court in Jain Shudh Vanaspathi Ltd., that the whole proceedings were held by the Supreme Court to be vitiated by fraud. The decision of the Supreme Court in Jain Shudh Vanaspathi Ltd., will not go to the rescue of the Department in view of the fact that there was a clear finding that the assessee got the goods cleared for home consumption under Section 47 of the Customs Act by playing a fraud upon the Department. Therefore, when an objection was taken that after clearance under Section 47, the provisions of Section 124 cannot be invoked, the Supreme Court pointed out that fraud vitiates all solemn acts. That is not the type of case that we are dealing here.

41. In so far as the decision of the Full Bench of the Tribunal in Asian Paints (India) Limited is concerned, the difficulty faced by the Tribunal was the different periods of limitation prescribed under Sections 11A and 35E. The case before the Full Bench of the Tribunal in Asian Paints (India) Limited was on the reverse. As seen from paragraph 1 of the decision of the Full Bench, the only issue referred for the consideration of the Larger Bench revolved around the limitation prescribed in Section 35E(3) and Section 11A. We are not dealing with a case where there is a logjam between two different provisions. Therefore, the said decision, which was also confirmed by the Supreme Court in Asian Paints (India) Limited [(2002) 142 ELT 522], cannot be of any application.

42. No one can have a quarrel with the proposition that Sections 35E and 11A operate in different fields and are invoked for different purposes. We are merely concerned in this case with the interplay between Sections 11A and 35E. We are also concerned with what happened in the form of an adjudication under Section 11B. What happens in a case where an adjudication takes place under Section 11B did not at all fall for consideration in Asian Paints (India) Limited.

43. The decision of this Court in Sivanandha Pipe Fittings Ltd., was also on the point as to whether it is open to the Authorities to take recourse to one remedy where several remedies are available. It is not the contention in this case

that there are plural remedies available to the Department. The contention in this case is as to whether, after having allowed an adjudication under Section 11B to attain finality, there was any remedy open to the Department at all under Section 11A. Therefore, the decision in Sivanandha Pipe Fittings Ltd., is also of no assistance to the Department.

44. In so far as the decision of the Jharkhand High Court in Gillooram Gaurishankar is concerned, the question that was referred to the High Court was whether the statutory remedies under Section 11A(1) will have to be exercised, to the exclusion of the remedies available under Section 35E(2) or not. In paragraph 4 of the decision, the Jharkhand High Court rightly held that there was no necessity to issue a show cause notice under Section 11A, when recourse has already been taken to Section 35E.

45. In so far as the decision of this Court in PRICOL Ltd., is concerned, one of the two questions of law referred was as to whether the amount erroneously refunded could not be recovered by filing an appeal under Section 35E without issuing a demand notice under Section 11A. That is not the situation in this case.

46. In this case, an order of refund was passed on an application under Section 11B. The appeal against the finalisation of the assessment was closed on the basis of the refund order. There can be no doubt about the fact that the statutory right of appeal is a valuable right conferred upon the assessee. That right was actually altered on the basis of an order of refund. Suppose there had been no order of refund, the appeal could have been pursued against the finalisation of the assessment.

47. In other words, two valuable rights, one in the form of right of appeal and another in the form of order of refund, are now sought to be taken away indirectly by taking recourse to Section 11A. What cannot be done directly cannot be done indirectly also.

48. In so far as the decision of the Andhra Pradesh High Court is concerned, one observation made in paragraph 16 of the said decision is of prime importance. In paragraph 16, the Andhra Pradesh High Court has made it clear, after analysing Sections 11A and 11B that there is an adjudication process involved in the processing of applications made under Sections 11A and 11B. The Andhra Pradesh High Court held that orders passed under Sections 11A and 11B are appealable. Therefore, the decision of the Andhra Pradesh High Court, especially the observations in paragraph 16, should be made use of by the assessee to contend that since there was no appeal against the

order under Section 11B, the Department cannot take recourse to Section 11A.

49. In Madurai Power Corporation, this Court had an occasion to consider the interplay of Sections 11A and 35E of the Act. In the said case, show cause notices issued to the Corporation as to why excise duty payable on low sulphur heavy stock and furnace oil should not be demanded, came to be challenged. The show cause notices were issued under Section 11A of the Act. Reliance was placed by the assessee upon the orders passed by the Adjudicating Authority under the Rules of the year 2001 and it was contended that such an order could be rectified only through an appeal mechanism prescribed under Section 35E(2). As seen from paragraph 11 of the decision, the contention of the assessee was that Section 11A does not contain a non obstante clause and that therefore, it cannot be invoked to nullify the appeal remedy available to the Department under Section 35E(2).

50. The very same argument now advanced by the Department to the effect that Sections 11A and 35E operate in two different independent fields was raised by them. After considering the issue elaborately and also after taking note of the decision in Asian Paints (India) Limited approved by the Supreme Court, this Court came to the conclusion in paragraph 23 as follows:

"In our opinion, there is no nexus between Section 11A and Section 35E. Section 11A does not indicate that the legislature intended to override Section 35E. Both sections have to be read harmoniously. In the present case, Annexure-I certificate has been issued in favour of the petitioners from time to time on executing B-8 security bond and on furnishing a bank guarantee. The Department has to follow the procedure under Section 35E for setting aside the Annexure-I certificate. Unless, the Annexure-I certificate is cancelled or rejected by the competent Authority, by following the procedure under Section 35E, it is not permissible for the respondents to invoke Section 11A of the Act. Therefore, we are of the considered opinion that the issuance of show cause notices is without jurisdiction and is liable to be struck down."

51. We are of the considered view that the paragraph extracted above is a complete answer to the question of law now raised. Unfortunately, in none of the decisions relied upon by the learned Standing Counsel,

the Courts were confronted with an order of adjudication passed under Section 11B on an application. Once an application for refund is allowed under Section 11B, the expression 'erroneous refund' appearing in Sub-Section (1) of Section 11A cannot be applied. If an order of refund is passed after adjudication, the amount refunded will not fall under the category of erroneous refund so as to enable the order of refund to be revoked under Section 11A(1). One Authority cannot be allowed to say in a collateral proceeding that what was done by another Authority was an erroneous thing. Therefore, the question of law has to be answered in favour of the appellant/assessee and the appeal deserves to be allowed.

52. In the result, the above civil miscellaneous appeal is allowed. No costs. Consequently, the above MP is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

- 1.The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench,
Chennai-6.
- 2.The Assistant Commissioner of Central Excise,
'C' Division,
Chennai I Central Excise Commissionerate,
Chennai-34.
- 3.The Commissioner of Central Excise,
Chennai I Central Excise Commissionerate,
Chennai-34.

+1cc to Mr.Lakshmi Kumaran, Advocate Sr.13824
+1cc to M/S.Rajnish Patheyil, Advocate sr.13961

CMA.No.973 of 2008
and MP.No.1 of 2008

ug (CO)
srg (24/05/2016)