

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.646 of 2006

Jalna Sahakari Sakhar Karkhana Ltd.,
Ramnagar, District Jalna
Through its Managing Director
Shri B.B. Sawle,
occupation : Service,
R/o Jalna.

.. Appellant.

Versus

The Commissioner of Central Excise
And Customs (formerly Collector of
Central Excise and Customs)
N-5, Town Center, CIDCO,
Aurangabad - 431 001.

.. Respondent.

Shri R.M. Sharma, Advocate, for appellant.
Shri D.S. Ladda, Standing Counsel, for respondent.

**CORAM: R.D. DHANUKA &
SUNIL K KOTWAL, JJ.**

Judgment reserved on 24th August, 2017

Judgment pronounced on 8th September, 2017.

JUDGMENT (Per R.D. Dhanuka, J.)

1] By this first appeal filed under section 35-G of the Central Excise Act, 1944 (for short, "the said Act"), the appellant has impugned the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai in Appeal No.

E-4606/94-SB-SRB dated 27th October 2005 dismissing the appeal filed by the appellant.

2] By an order dated 8th September, 2006, this Court formulated following substantial questions of law:

“(1) Whether the Tribunal committed error while interpreting and construing the provisions of Section 11-D of C.E.A., 1944, while ignoring the interpretation and construction of provisions of Section 5-A of C.E.A., 1944, granting exemption from duty of excise to the Appellant / Assessee which is required to be construed liberally while upholding the impugned order passed by the respondent Authority ?

(2) Whether the Tribunal is justified in law to uphold the impugned order passed by respondent Authority, by committing error by misreading and misconstruing the provisions of section 11-D *vis-a-vis* the provision of Section 5-A of the Central Excise Act, 1944, by failing to construe the aforesaid provisions by adopting principle of purposive interpretation of the statutes in the interest of justice ?”

3] Some of the relevant facts for the purpose of deciding this appeal filed under section 35-G of the said Act, which is numbered as first appeal, are as under.

4] It is the case of the appellant that the appellant was a

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new sugar factory, established in the capacity of 1250 of TCD and had commenced its production of sugar after obtaining certificate No.845 dated 11th August 1989 from the Government of India, Ministry of Food and Civil Supplies, Department of Food, Directorate of Sugar, New Delhi. It is the case of the appellant that the Central Excise and Customs, New Delhi, had granted exemption under Notification Nos.130/83 and 131/93 dated 27th April, 1983 as amended in terms of the incentive scheme issued by the Government of India, Ministry of Food and Civil Supplies.

5] On 4th November, 1987 the Government of India, Ministry of Food and Civil Supplies, Department of Food, New Delhi, issued an incentive scheme for new sugar factories and expansion projects licensed during Sixth Five-Year Plan period. It was provided that the 1987 Scheme will apply to all new sugar factories and Expansion Projects to whom letters of intent or industrial licences were issued between 1st October, 1980 and 1985 subject to their fulfilling the conditions and requirements prescribed under the said scheme. In so far as the issue of excise duty concession, which is subject matter of this appeal, is concerned, the relevant part the said scheme is extracted as under :-

“Applicability of the Scheme:

2. The 1987 Scheme will apply to all new sugar factories and expansion projects to whom letters of intent or industrial licence were issued between 1-10-1980 and 1985, subject to their fulfilling the conditions and requirements prescribed at A, B and C hereunder :

2.AIn respect of both new factories & expansion projects:

(i) For eligibility to incentives under the 1987 Scheme, the respective letter of intent as well as industrial licence should have been issued after 1-10-1980. Where letters of intent had been issued prior to 1-10-1980 but were converted into industrial licences after the said date, the eligibility to incentives will be governed only by the 1980 Scheme and not the 1987 Scheme.

(ii)**Limit for commencement of production** : In order to become entitled to incentives or the full period as detailed in paragraph 4 of this Scheme, the date of commencement of production for the first time (in respect of new factories) and the date of commencement of production at the expanded capacity (in respect of expansion projects) shall be within a period of 39 months may be granted by the Government in exceptional circumstances based on the merits of individual cases.

(iii) **Sliding Scale of Incentives:-** In the event delay in the afe said commencement production beyond the stipulated period of 39 months from the date of letter of intent or licence whichever is earlier, the grant o incentives would be regulated on a sliding scale in accordance with this Directorate's circular no. F.13/85-PC dated 11-11-1985.

(iv) **Quantum of incentives free sale quota:** The quantum of incentive under the 1987 Scheme by way of percentage of higher free sale quota, including the normal free sale quota of sugar in respect of new factories and expansion projects shall be in accordance with the scales prescribed in paragraph 2.B(iii) and 2.C(iv) herein under respectively.

(v) **Excise Duty Concession:** In addition to the higher resale quota mentioned above, the new factories and expansion project which become entitled to incentives under the 1987 Scheme will be allowed :

- (a) to pay excise duty as applicable to levy sugar; and
- (b) to retain the difference in excise duty as between

levy and free sale sugar.

in respect of the incentive resale quota in excess of the normal resale quota.

(vi) In regard to the excise duty concessions under this Scheme, necessary notification would be issued by the Ministry of Finance (Department of Revenue) separately.

2.B New Sugar Factories: In respect of new sugar factories :

(i) For eligibility to incentives under the 1987 scheme, the f.o.r. cost of plant and machinery shall not be below Rs.400 lakhs. New factories established at a plant and machinery cost of less than Rs.400 lakhs will not be entitled to incentives under this Scheme, but would continue to be governed by the 1980 Scheme.

(ii) "F.O.R. cost of plant and Machinery" for the purpose of the scheme shall mean the actual cost of a 1250 TCD standard plant as prescribed by the Government of India (excluding 18 optional items of machinery) on f.o.r. (machinery manufacturers works) basis. The expenses incurred on freight, insurance, octroi, sales tax, packing and forwarding charges in respect of plant and machinery and the erection thereto at the factory site, supervision, commissioning charges etc., and such other items of expenses as the Government may decide, will not be taken into account in determining the f.o.r. cost of plant and machinery.

(iii) **Scale of incentives free sale quota:** The incentives by way of higher free sale quota, including normal resale quota of sugar are at percentages as given below for high, Medium and low recovery areas :

Year	HRA	MRA	LRA
1	100	100	100
2	100	100	100
3	100	100	100
4	100	100	100
5	100	100	100
6	----	100	100
7	----	100	100
8	----	100	100
9	----	----	100
10	----	----	100."

6] Under clause 8 of the said scheme, the new sugar factories and expansion projects which are eligible for incentive under the said scheme, are under obligation to furnish to the Directorate of Sugar, Krishi Bhavan, New Delhi, on completion of their projects all the relevant information and documents in such forms/annexures as may be prescribed by the Government, for verification of their entitlements.

7] It is the case of the appellant that the said sugar incentive scheme was commenced by the Government of India in terms of provisions of section 3 of the Essential Commodities Act, 1955 with an object to encourage indigenous sugar production and to achieve the target envisaged, whereby the said incentives under the said scheme was partly based on higher percentage of free sale sugar quota and partly on excise duty concession/exemptions pursuant to the provisions of section 5-A of the said Act read with Rule 8(2) of the Central Excise Rules, 1944 by issuance of notifications dated 27th April, 1983 to enable the new sugar factories to repay the advances and loans out of the additional funds generated out the benefits of those sugar incentive scheme.

8] During the period between 12th March, 1992 and 29th September, 1993, the office of the respondent, through Superintendent of Central Excise, Jalna, issued six notices-cum-demand to the appellant. In the said show cause notices, it was alleged that during the period between 20th September, 1991 and 31st January, 1992 and various period upto July, 1993, the appellant had cleared the white crystal sugar under incentive scheme by charging Excise duty as basic Rs.17/-, additional Rs.21/- and cess Rs.14/- i.e. totaling to Rs.52/- per quintal and debited the same to their P.L.A. account during the said period between 20-9-1991 and 31-1-1992.

9] It was further alleged in the said notices that the appellant had actually charged and collected more amount from the customers at the rate i.e. basic Rs.34/-, additional Rs.37/- and cess Rs.14/- totaling Rs.85/- per quintal as Central Excise duty. The appellant had collected the amount of Rs.85/- per quintal, however, had deposited Rs.52/- per quintal with the Central Government. According to the respondents, the appellant had thus withheld a sum of Rs.60,12,699/-. By those six show cause notices, the Superintendent, Central Excise and Customs, Jalna, directed the appellant to show cause as to why the differential excise duty of

Rs.60,12,699/- should not be recovered from the appellant under section 11-A of the said Act. The appellant was also directed to produce at the time of showing causes all the evidence upto date, the appellant would rely upon in support of their defences. The appellant was also directed to state in their reply whether they wish to be heard in person before the cases were adjudicated upon.

10] In response to these show cause notices, the appellant filed separate reply to each of the show cause notices disputing the said demand and requesting the learned Assistant Collector to give personal hearing to the appellant.

11] The learned Collector, Central Excise and Customs, passed an order on 13th August, 1994 on the said six show cause notices issued against the appellant and confirmed the demand of Rs.60,12,699/- in so far as the appellant is concerned. By the said order passed by the Collector of Central Excise and Customs, the demand was also confirmed in respect of seven other Assessees.

12] Being aggrieved by the said order dated 13th August, 1994 passed by the learned Collector of the Central Excise and Customs, the appellant herein filed an appeal under section 35-B of

the said Act before the Customs, Excise, Gold (Control) Appellate Tribunal (West Region Bench) Bombay.

13] By an order dated 27th October, 2005, the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (hereinafter referred to "the said Tribunal") dismissed the said appeal filed by the appellant. Being aggrieved by the said order passed by the said Tribunal, the appellant has preferred this appeal under section 35-G of the said Act.

14] Mr.R.M. Sharma, learned counsel for the appellant, invited our attention to the notification dated 4th November, 1987, issued by the Government of India, Ministry of Food and Civil Supplies (Department of Food), which is relied upon by the appellant for the purpose of availing of excise duty concession and would submit that the appellant having established a new factory was entitled to avail of the excise duty concession referred to in Clause 2A(v). He submits that the appellant was thus entitled to retain the difference in excise duty as between levy and free sale sugar and was only liable to pay the excise duty as applicable to levy sugar under the said notification issued u/s 3 of the Essential Commodities Act, 1955.

15] It is submitted by the learned counsel that the appellant had not retained any portion of the amount of excise duty collected by the appellant from its customers. He submits that the difference between the amount collected by the appellant and deposited by the appellant with the Government was given by way of rebate to the customers and thus no amount was actually retained by the appellant. He submits that the learned Collector, Central Excise and Customs, however, before passing the order on 13th August, 1994, did not give an opportunity to the appellant to produce various documents including the registers maintained by the appellant to show that such rebate was given by the appellant to its customers and no amount of the duty collected by the appellant was retained by the appellant.

16] It is submitted that the learned Collector of Central Excise and Customs did not give any opportunity to the appellant to represent the appellant through an Advocate and passed a common order in respect of several assesseees without application of mind and without considering the objections raised and the submissions made by the appellant in reply to the show cause notices issued by the Assistant Collector of Central Excise upon the

appellant.

17] The learned counsel for the appellant placed reliance on the judgment of the Supreme Court in case of *Belapur Sugar & Allied Industries Ltd. v. Collector of Central Excise, Aurangabad* **(1999) 4 SCC 103** and in particular paragraph nos.8 and 9 and would submit that the exemption notification issued by the Central Government u/s 3 of the Essential Commodities Act, 1955, requires purposive interpretation and cannot be read in isolation. He submits that the benefits in respect of the payment of excise duty already granted under the said notification dated 4th November, 1987, by the Central Government u/s 3 of the Essential Commodities Act cannot be taken away by subsequent legislation u/s 11-D of the Central Excise and Salt Act, 1944. The benefits already given to the appellant had to be given due weightage by the learned Collector of Central Excise and Customs in the impugned order as well as by the said Tribunal.

18] It is submitted by the learned counsel for the appellant that the appellant had established its industry based on the said notification dated 4th November, 1987 and thus the respondent was estopped from taking away such benefit granted under the said

notification. In support of this submission, the learned counsel for the appellant placed reliance on the judgment of Andhra Pradesh High Court in case of *Cuddapah Cooperative Sugars Ltd. v. Union of India & others* **(1988 (38) E.L.T., 257 (A.P.)** and in particular paragraph nos.10 to 12. He submits that the said notification granting concession in payment of excise duty was issued in 1987 whereas Section 11-D was introduced in the Central Excise and Salt Act, 1944, for the first time in the year 1991. The appellant had already spent substantial amount in establishing its new factory and thus no effect to Section 11-D could have been given by the Central Government to such assesseees who had already set up industries based on the notification issued by the Central Government under the provisions of the Essential Commodities Act, 1955.

19] The learned counsel for the appellant placed reliance on the judgment of the Supreme Court in the case of *Mahabir Vegetable Oils Pvt. Ltd. & another v. State of Haryana & others* **(2006 (3) SCC 620)** in support of his submission that pursuant to the exemption notification dated 4th November, 1987, issued by the Ministry of Food and Civil Supplies, the appellant has acted upon the said notification and had started a new factory and such benefit

already accrued in favour of the appellant under the said exemption notification cannot be taken away by the Central Government purportedly u/s 11-D of the Central Excise and Salt Act, 1944.

20] The learned counsel for the appellant invited our attention to the judgment of the Supreme Court in case of *Kisan Sahkari Chini Mills Ltd. v. Collector of Central Excise, Allahabad* **(2005 (182) E.L.T. 26 (S.C.))**, which is relied upon by the said Tribunal while rejecting the appeal filed by the appellant. He submits that in the said judgment, the Supreme Court has only interpreted the effect of Section 11-D of the Central Excise and Salt Act, 1944 and has not considered the effect of pre-existing notification issued by the Central Government u/s 3 of the Essential Commodities Act, 1955.

21] Mr.Ladda, learned counsel for the Revenue, on the other hand, placed reliance on various findings recorded by the Collector of Central Excise and Customs in the impugned order and also the findings recorded by the said Tribunal in the impugned order dated 21.10.2005. He submits that the Collector of Central Excise has already considered in detail the effect of the said notification dated

4th November, 1987 in the impugned order. He submits that after considering the said incentive scheme issued by the Ministry of Food and Civil Supplies, Department of Food, Directorate of Sugar, the Collector of Central Excise and Customs has rightly upheld the recovery mentioned in the show cause notices issued u/s 11-A. He submits that the learned Collector has also considered the effect of *non obstante* clause provided in Section 11-D of the Central Excise and Salt Act, 1944, as well as the *non obstante* clause provided in Section 6 of the Essential Commodities Act and has rejected the contention of the assessee rightly.

22] The learned counsel for the Revenue distinguished the judgment of the Supreme Court in case of *Belapur Sugar and Allied Industries Ltd.* (supra) on the ground that in that matter, the duty paid by the assessee was more and after such payment was made, the duty was reduced by the Central Government by issuing a notification. The Revenue had denied the benefit of such exemption and such notification to the assessee. After considering such situation in hand, the Supreme Court granted benefit of such notification to the assessee. He submits that the facts before the Supreme Court in the said judgment in case of *Belapur Sugar and Allied Industries Ltd.* (supra) are totally different and are clearly

distinguishable.

23] Insofar as judgment of the Supreme Court in case of *Mahabir Vegetable Oils Pvt. Ltd. & another* (supra), relied upon by the learned counsel for the appellant is concerned, he submits that the issue of alleged *promissory estoppel* raised by the appellant in this appeal could not have been adjudicated by the Collector of Central Excise and Customs. He submits that the appellant did not file any proceedings for enforcement of the said notification dated 4th November, 1987, issued by the Government of India, Ministry of Food and Civil Supplies.

24] The learned counsel for the Revenue submits that the appellant recovered excise duty at the rate of Rs.85/- per quintal, however, had admittedly paid excise duty at the rate of Rs.52/- per quintal. The appellant, however, has only shown collection of excise duty at Rs.52/- from its customers and had suppressed the true and material facts. The authority, however, after perusing the documents produced by the appellant, found that the recovery of excise duty effected by the appellant, was at the rate of Rs.85/- per quintal, whereas the payment was only made at the rate of Rs.52/- per quintal. He submits that u/s 11-D of the Central Excise and

Salt Act, 1944, the appellant could not have retained any part of the duty collected by the appellant from the customers and was liable to pay the entire amount of such duty with the Revenue.

25] It is submitted by the learned counsel for the respondent that the judgment of the Supreme Court in case of *Kisan Sahkari Chini Mills Ltd.* (supra) squarely applies to the facts of this case. The Supreme Court had considered the issue of incentives granted to the assessee and had categorically held that the incentives did not permit the assessee to collect more than what they had themselves paid, from their customers.

26] Insofar as submission of the learned counsel for the appellant that there was no opportunity granted to appear through Advocate before the learned Collector of Central Excise and Customs or that there was no opportunity to produce any documents before the learned Collector of Central Excise and Customs is concerned, he submits that this submission of the appellant is factually incorrect. The appellant had appeared through its Advocate. The learned Collector of Central Excise and Customs had already granted opportunity to the appellant to produce the relevant documents in support of their case before the

authority. The appellant thus cannot make any grievance before this Court that no such opportunity was given by the authority to produce the relevant documents.

27] It is not in dispute that when the Government of India, Ministry of Food and Civil Supplies, had issued the said incentive scheme on 4th November, 1987 for new sugar factories and expansion projects, Section 11-D of the Central Excise and Salt Act, 1944 was not introduced by the Central Government. The Constitutional validity of Section 11-D of the Central Excise and Salt Act, 1944 has been already upheld by the Supreme Court.

28] A perusal of the show cause notices issued by the Superintendent, Central Excise and Customs to the appellant clearly indicates that it was the case of the authority that the appellant had collected the excise duty at the rate of Rs.85/- per quintal and had paid at the rate of Rs.52/- per quintal to the Government and thus the differential amount of Rs.33/- per quintal was liable to be deposited by the appellant with the authority. The said show cause notices also indicate that the appellant was directed to produce at the time of showing cause all the evidence upon which it had intended to rely in support of its defence and

also to indicate whether the appellant wanted to be heard in person before this case was adjudicated upon.

29] A perusal of one of the replies, which was identical to all the show cause notices issued by the authority and filed by the appellant, indicates that the appellant had placed reliance upon the notification dated 4th November, 1987, issued by the Government of India, Ministry of Food and Civil Supplies, in its reply. In the said reply, it was alleged by the appellant that the appellant had not charged to its customers at the rate of basic Rs.34/- plus additional Rs.37/- and cess of Rs.14/-, totaling to Rs.85/- per quintal and had deposited Rs.52/- per quintal with the Central Government. It was mentioned that the appellant was ready to appraise its billing system in which it had shown rebate to its customers accordingly.

30] A perusal of the order dated 13th August, 1994, passed by the Collector of Central Excise and Customs, indicates that it was a common order in respect of eight assessees including the appellant against whom the demand of excess amount recovered by the appellant was Rs.6012699/-. By the said common order, the learned Collector of Central Excise and Customs rejected the contentions raised by the assessees including the appellant. A

perusal of the said order indicates that the learned Collector of Central Excise and Customs had given personal hearing to all the assesseees. Shri K.P. Joshi Advocate had appeared on behalf of the appellant alongwith its representatives before the learned Collector of Central Excise and Customs who had made various submissions.

31] The learned Collector of Central Excise and Customs had observed that all the assesseees had availed of the benefits of the incentive scheme dated 4th November, 1987 for payment of concessional rates of duties in terms of notification Nos.130/1983 and 131/1983, both dated 27th April, 1983, and had recovered duty in excess than the rates applicable to free sale sugar and had retained the differential amount of duties as per paragraph 2A(v) of the said incentive scheme. It was also observed that except the appellant herein, who had recovered an amount equivalent to excise duty, it represented the differential amount as rebate. The learned Collector of Central Excise and Customs made a finding that in the facts of all those cases, the recovery and retention of amounts representing duties of excise as provided by Section 11-D of the Central Excise and Salt Act, 1944, had been established beyond doubt.

32] In the said impugned order, the learned Collector of Central Excise and Customs also considered Clause 2A(vi) of the said incentive scheme, which provided that in regard to the excise duty concessions under the said scheme, necessary notification would be issued by the Ministry of Finance (Department of Revenue) separately. The learned Collector of Central Excise and Customs referred to the notification No.130/1983 dated 27th April, 1983, granting concessional rate of duty against basic duty and under notification No.131/1983 dated 27th April, 1983, to additional excise duty, which was equal to the levy sugar. It is held that both the notifications issued under Rule 8(1) of the Central Excise Rules, 1944, and amended from time to time, did not authorize any sugar manufacturer to collect more amount representing duty of excise as well as retention thereof, but allowed to clear the sugar bags covered under additional entitlement under the incentive scheme at the concessional rates prescribed in the notifications.

33] In the said impugned order, the learned Collector of Central Excise and Customs also held that the said incentive scheme dated 4th November, 1987 was without the support of any statutory provision of the Act of the Parliament making specific

provisions for such collection and retention thereof. It was not mentioned in the said notification that the same was issued u/s 3 of the Essential Commodities Act, 1955, as claimed by the assesseees. It is held by the learned Collector of Central Excise and Customs that Section 3 of the Essential Commodities Act, 1955, did not permit recovery and retention of duties and taxes in excess of the limits prescribed under the provisions of relevant statutory enactments including the Central Excise and Salt Act, 1944.

34] It is held that the incentive scheme is nothing but the executive instructions of the Ministry of Food and Civil Supplies and thus it could not override the provisions of Section 11-D of the Central Excise and Salt Act, 1944, enacted by the Parliament. The learned Collector of Central Excise and Customs relied upon the judgment of the Supreme Court in case of *Bindeshwari Ram v. State of Bihar & others* **(1990 (27) E.C.R. 82 (S.C.))** holding that the executive instructions cannot prevail over the statutory rules and in absence of statutory rules, executive instructions have no relevance or force. The learned Collector of Central Excise and Customs has accordingly rendered a finding that it was established that the excess amount was recovered and retained by all the assesseees including the appellant herein representing the duty of

excise as an incentive under the incentive scheme dated 4th November, 1987 illegally and thus the appellant was liable to pay the said amount as demanded in the show cause notices issued by the authority.

35] A perusal of the said order passed by the learned Collector of Central Excise and Customs indicates that the said authority has also considered the *non obstante* clause in Section 11-D of the Central Excise and Salt Act, 1944 and the *non obstante* clause provided in Section 6 of the Essential Commodities Act, 1955 and has held that the *non obstante* clause in Section 11-D of the Central Excise and Salt Act, 1944, which has been enacted after the Essential Commodities Act, 1955, is later one and is more specific and thus will override the provisions of the Essential Commodities Act, 1955 and other provisions of law. In the said order, the learned Collector of Central Excise and Customs directed the appellants to pay a sum of Rs.6012699/- in terms of provisions of Section 11-D(1) of the Central Excise and Salt Act, 1944 and did not impose any penalty on any of the assesseees including the appellant.

36] A perusal of the appeal memo filed by the appellant

before the Tribunal indicates that though the appellant had raised a ground that the appellant had not charged their customers for excess collection as duty, but had collected rebate as per incentive scheme, 1987, the appellant did not produce any record before the said Tribunal. The said Tribunal has also recorded a finding that the appellant had retained the differential amount collected by them in accordance with the sugar incentive scheme dated 4th November, 1987 and has not deposited the entire amount with the Revenue. The said Tribunal has followed the principles laid down by the Supreme Court in the case of *Kisan Sahkari Chini Mills Ltd.* (supra) and has rejected the appeal filed by the appellant.

37] A perusal of the appeal memo filed by the appellant in this appeal indicates that no ground is raised by the appellant contending that though the appellant had produced the relevant documents to show that the appellant had not retained any amount out of the amount recovered as duty from its customers including the rebate, the Collector of Central Excise and Customs as well as the said Tribunal have not considered such documents. In our view, the Collector of Central Excise and Customs has, after granting sufficient opportunity to the appellant, dealt with all the issues and fact as well as law and has rightly upheld the demand

raised in the show cause notices issued by the authority.

38] A perusal of the record indicates that no such record was produced by the appellant though in the show cause notices itself, the appellant was called upon to produce any documents which the appellant wanted to rely upon in support of its reply before the authority. This Court thus for the first time cannot allow the appellant to rely upon any documents, which were not produced before the authority as well as the Tribunal. We are also not inclined to accept the submission of the learned counsel for the assessee that the matter shall be remanded before the learned Collector of Central Excise and Customs for the purpose of giving an opportunity to the appellant at this stage to rely upon such documents, which were not produced in spite of an opportunity granted by the authority to the appellant.

39] In our view, the learned Collector of Central Excise and Customs has rightly held that sub-clause (v) of Clause 2A of the said incentive scheme has to be read with sub-clause (vi), which had made it clear that in regard to the excise duty concessions under the said scheme, necessary notification would be issued by the Ministry of Finance (Department of Revenue) separately. The

learned Collector of Central Excise and Customs considered those two notifications, which were issued by the Central Government in this regard from time to time duly amended and has rightly held that none of the notifications permitted the assessee to retain any amount out of the duty recovered by the assessee and not to pay to the Government.

40] Insofar as the submission of the learned counsel for the appellant that there was no opportunity to engage an Advocate was granted by the learned Collector of Central Excise and Customs is concerned, this submission of the learned counsel is *ex-facie* contrary to the averments made in paragraph no.8 of the appeal memo filed by the appellant before the said Tribunal, in which it has been admitted that the said Collector of Central Excise and Customs had heard the appellant through their Advocate in those six show cause notices. A perusal of the order passed by the learned Collector of Central Excise and Customs and more particularly paragraph no.4 of the said order also clearly records that a personal hearing was given to the appellant through its Advocate Shri K.P. Joshi.

41] Insofar as the submission of the learned counsel for the

appellant that the rights vested in the appellant under the said incentive scheme cannot be taken away by Section 11-D after the appellant had acted upon the said incentive scheme detrimental to its interest and the said section was in breach of *promissory estoppel* is concerned, in our view, such issue could not have been raised before the Collector of Central Excise and Customs by the appellant. The appellant did not file any proceedings for enforcement of the said incentive scheme before any Court of law. Be that as it may, in our view, the learned Collector of Central Excise and Customs has rightly held that no such incentive scheme, which was in the nature of executive instructions had in any event was subject to further notification to be issued by the Government could be given effect to while considering the provisions of Section 11-D of the Central Excise and Customs Act.

42] In our view, even otherwise in view of the *non obstante* clause provided in Section 11-D of the Central Excise and Salt Act, 1944, which was introduced later in point of time, the said provision will prevail over the provisions of the Essential Commodities Act, 1955, having similar *non obstante* provision in Section 6.

43] So far as the judgment of the Supreme Court in case of *Belapur Sugar & Allied Industries Ltd.* (supra) relied upon by the learned counsel for the appellant is concerned, in our view, the learned counsel for the Revenue has rightly distinguished the said judgment on the ground that after paying the excise duty, the excise duty was reduced and thus the benefit of such notification would not have been refused to the assessee. The facts before the Supreme Court in the said judgment were totally different and are clearly distinguishable with the facts of this case.

44] Insofar as the judgment of Andhra Pradesh High Court in case of *Cuddapah Cooperative Sugars Ltd.* (supra) relied upon by the learned counsel for the appellant is concerned, the said judgment would not assist the case of the appellant. The said judgment was delivered prior to the introduction of Section 11-D of the Central Excise and Salt Act, 1944. Even otherwise, the facts of the said judgment are totally different and would not advance the case of the appellant.

45] Insofar as the judgment of the Supreme Court in case of *Mahabir Vegetable Oils Pvt. Ltd. & another* (supra) is concerned, the said judgment also would not assist the case of the appellant

even remotely and is clearly distinguishable from the present case. The issue involved before the Supreme Court was totally different.

46] Insofar as the substantial questions of law formulated by this Court are concerned, for the reasons recorded aforesaid, so far as the question no.1 is concerned, the same is answered in negative, against the assessee and in favour of the Revenue. Insofar as the substantial question of law at Sr.No.2 is concerned, the same is answered in affirmative, against the assessee and in favour of the Revenue.

47] In the result, First Appeal No.646/2006 is dismissed. There shall be no order as to costs.

(SUNIL K. KOTWAL, J.)

(R.D. DHANUKA, J.)