

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.04.2017

DELIVERED ON : 13.06.2017

Coram

The Honourable Mr. JUSTICE RAJIV SHAKDHER,
and
The Honourable Mr. JUSTICE S.SURESH KUMAR

C.M.A.No.287 of 2015
and MP No.1 of 2015

M/s.Mohan Breweries & Distilleries Ltd.,
PIPDIC Industrial Estate,
Mettupalayam, Pondicherry-605 009. Appellant

Vs.

The Commissioner of Central Excise,
Office of the Commissioner of Central Excise,
No.1, Gouber Avenue, Beach Road,
Puducherry-605 001. Respondent

Prayer: Civil Miscellaneous Appeal filed Under Section 35G of the Centra Excise Act, 1944 praying to set aside the impugned Final Order No.40278 of 2014 dated 06.03.2014 in Appeal No.E/696/2007-SM, passed by the Customs, Excise, Service Tax Appellate Tribunal, Chennai. as against the order of the Commissioner of Central Excise (Appeal) in A.No.90/06(P).

For Appellant : Mr.C.Saravanan

For Respondents: Mr.A.P.Srinivas,
Standing Counsel

JUDGMENT

(Judgment of the Court was made by Rajiv Shakdher, J.)

Background Facts:

1. This is an appeal directed against the judgment and order dated 06.03.2014, passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai (in short 'the Tribunal').

1.1. By virtue of the impugned judgement, the Tribunal has

sustained the decision of the Commissioner of Central Excise (Appeals)
[in short 'the Commissioner (Appeals)'].

1.2. The Commissioner (Appeals) vide order dated 18.06.2007, allowed the Appellant/Assessee to avail MODVAT Credit for the period spanning between 01.03.1997 and 03.05.1997 and upheld the demand for duty for the period commencing from 23.07.1996 and ending on 28.02.1997.

2. The Appellant/Assessee, being aggrieved, as indicated above, has come up in appeal to this Court.

2.1. We are informed that the Revenue has not preferred an appeal in respect of the period, for which, MODVAT credit has been allowed, i.e., the period spanning between 01.03.1997 to 03.05.1997.

3. The aforementioned appeal was admitted on 09.04.2015, when, the following substantial question of law was framed for consideration by this Court:

"Whether the demand for recovery of MODVAT credit with interest as per Notification No.14 of 1997 CE(NT) dated 03.05.1997 read with Section 87 of the Finance Act, 1997 and Rule 57-I of the Central Excise Rules and Section 11A of the Central Excise Act for the period 23.07.1996 to 28.02.1997 is justified ?"

4. In order to adjudicate the appeal, the following broad facts are required to be noticed :

4.1. The Appellant/Assessee is a manufacturer of Glass Bottles, which fall under sub-heading No.7007.90 of the Schedule appended to the Central Excise Tariff Act, 1985 (in short 'CETA').

4.2. Notably, for the purpose of manufacturing Glass Bottles, the Appellant/Assessee used several inputs, including Furnace Oil. Furnace oil, was used by the Appellant/Assessee, as fuel.

4.3. The Appellant/Assessee availed of MODVAT credit in respect of "specified duty", by relying upon Notification No.5/94-CE (NT), dated 01.03.1994. At this juncture, it would be pertinent to note that the said notification was issued under Rule 57A of the Central Excise Rules, 1944 (in short '1944 Rules'), as prevalent at the relevant point in time.

4.4. The Notification dated 01.03.1994 was, however,

amended, by Notification No.14/97-CE(NT), dated 03.05.1997.

4.5. The net effect of the said amendment was that the credit on inputs, which, inter alia, included Furnace oil was restricted to "10% ad valorem". This impacted the Appellant/Assessee, in as much as, it was seeking MODVAT credit on Furnace oil upto that date at the rate of "15% ad valorem".

4.6. As is obvious, the notification dated 03.05.1997, would, ordinarily, have operated prospectively, but for the legislative intervention made in the matter, via Section 87 of the Finance Act, 1997 (Act No.26 of 1997) [in short 'the Finance Act'].

4.7. The Finance Act, which was given effect from 14.05.1997, amended the notification dated 03.05.1997, in a manner that the restriction imposed on the rate, at which MODVAT credit could be availed of on specified inputs, which included furnace oil, was made operable, albeit, retrospectively, that is, even for the period spanning between 23.07.1996 and 03.05.1997.

4.8. Thus, a perusal of Section 87 of the Finance Act, would show that it provides in no uncertain terms, amongst other aspects that the restriction provided in Notification dated 03.05.1997, shall (a) be deemed to have, and to have always had, effect on and from the 23rd day of July, 1996; and (b) is deemed to prevail, and to have always prevailed, over all notifications issued on or after the 23rd day of July, 1996, but before the 3rd day of May, 1997, under rule 57A in relation to specified petroleum products.

4.9. The explanation to Sub-section (1) of Section 87, clearly, brings Furnace oil within the realm of the said provision.

5. It is, in this background, on 01.11.1997, a Show Cause Notice (in short, 'SCN') was issued to the Appellant/Assessee raising a demand in the sum of Rs.7,60,566/- for the period spanning between 23.07.1996 and 02.05.1997, along with interest @ 18% to be calculated on the said amount for the period commencing from 12.08.1997 and ending on the date of payment. Furthermore, via the very SCN, a proposal was also made for imposing penalty.

5.1. Consequently, the Appellant/Assessee filed a reply dated 26.03.1998 to the said SCN. In the reply, the stand taken was that, for the period falling between 03.05.1997 and 19.06.1997, it had already "expunged" MODVAT credit to the extent of Rs.2,54,701/-, in consonance with Notification

No.14/97 CE (NT), dated 03.05.1997.

5.2. In so far as the demand for interest was concerned, it was stated that it was premature, as under Section 87(2)(c) of the Finance Act, interest would be payable, only, if, the amount demanded was not paid within ninety (90) days of the enactment of the Bill.

5.3. As regards, penalty, reliance was placed on explanation to Section 87 of the Finance Act. The stand, which, the Appellant /Assessee appears to have taken with respect to penalty was that the alleged infraction was not an offence prior to the enactment of the Finance Act.

6. The record shows that the Adjudicating Authority was not impressed with the stand taken by the Appellant/Assessee, and thus, proceeded to pass the Order-in-Original dated 25.04.2006, whereby, the demand in the sum of Rs.7,60,566/- was sustained, being, the excess credit availed of by the Appellant/Assessee for the period spanning between 23.07.1996 to 03.05.1997. Reliance, in this behalf, was placed by the Adjudicating Authority, on the provisions of Section 87 of the Finance Act and Rule 57I of the 1944 Rules read with Section 11A of the Central Excise Act, 1944 (in short 'the CE Act').

6.1. Furthermore, the Appellant/Assessee was directed to pay interest @ 18%. The demand qua interest was also made under Section 87 of the Finance Act, though, read with Section 11AA of the CE Act. The interest demanded was required to commence from 13.08.1997 and was ordered to run till the date of liquidation of the demand.

6.2. Being aggrieved, the Appellant/Assessee filed an appeal with the Commissioner (Appeals). The Commissioner (Appeals), vide order dated 18.06.2007, allowed the appeal of the Appellant/Assessee, albeit, partially. In other words, while the Commissioner (Appeals), confirmed the demand of duty for the period 23.07.1996 to 28.02.1997, along with interest, he set aside the demand of duty for the period spanning between 01.03.1997 and 03.05.1997.

6.3. The order of the Commissioner (Appeals), led to, both, the Appellant/Assessee as well as the Revenue preferring appeals with the Tribunal.

6.4. As indicated at the outset, the Tribunal dismissed the appeals filed by the Appellant/Assessee as well as by the Revenue.

7. Therefore, before us, the Appellant/Assessee's appeal is

confined to that part of the Tribunal's order, whereby, the Commissioner (Appeals) has sustained the demand for the period 23.07.1996 to 28.02.1997.

Submissions of Counsels:

8. In the background of these facts, arguments, on behalf of the Appellant/Assessee, were advanced by Mr.C.Saravanan, while the submissions on behalf of the Revenue, have been made by Mr.A.P.Srinivas.

9. Mr.Saravanan, says that the order of the Tribunal is erroneous for the following reasons :

(1) Firstly, that it failed to recognise that MODVAT credit had been availed of by the Appellant/Assessee under Rule 57D, and therefore, the amendment of the notification dated 01.03.1994, via the Notification dated 03.05.1997, would have no impact, notwithstanding the fact that it was issued under Rule 57A of the 1944 Rules, as it obtained at the relevant point in time. Likewise, according to the learned counsel for the Appellant/Assessee, the provision of Section 87 of the Finance Act, would have no impact, as the amendment made via the said provision was brought about in respect of the Notification dated 03.05.1997, which, as indicated above, was issued under Rule 57A of the 1944 Rules.

(ii). Secondly, it was submitted that the Tribunal had failed to note that the SCN dated 01.11.1997, could relate back, at best, in point of time, by a period of six months, and therefore, demand, if any, can be sustained, only for the period falling between 01.06.1997 and 01.11.1997. In other words, according to the learned counsel, having regard to the provisions of Section 11A of the CE Act, the demand for the period spanning between 23.07.1996 and 01.05.1997, was time barred. Learned counsel contended that Section 87 of the Finance Act, could not be construed in a manner that it overrides the provisions of Section 11A of the CE Act in the absence of an express indication in that behalf in the statute. In support of this submission, learned counsel relied upon the judgement of the Supreme Court in J.K. Spinning and Weaving Mills Ltd. and Another V. Union of India and Others, 1987 (32) ELT 234 (SC) and, the judgement dated 20.07.2010, passed in the Appellant/Assessee's own case in W.P.No.17511 of 1997.

(iii). Thirdly, the Tribunal, erroneously, failed to apply the

dicta laid down by the Supreme Court in the matter of :
Jindal Poly Films Ltd. V. Commissioner of Central Excise,
2006 (198) ELT 3 (SC).

(iv).Lastly, the Tribunal failed to appreciate that Section 87 of the Finance Act only validated actions, if any, taken in the matter and not, that it provided leeway to initiate proceedings for recovery of excess credit of duty taken by the Appellant/Assessee. In this behalf, reliance was laid on Sub-section (2) of Section 87 of the Finance Act.

10. Mr.Srinivas, on the other hand, submitted that with the insertion of Section 87 in the Finance Act, the Appellant/Assessee cannot claim MODVAT credit for the period in issue. According to the learned counsel, the Appellant/Assessee was seeking MODVAT credit under Notification dated 01.03.1994, which was issued under Rule 57A, and therefore, the submission made that it had been availing MODVAT credit under Rule 57D, is completely contrary to facts.

10.1. In so far as the argument advanced on behalf of the Appellant/Assessee with regard to Section 87 of the Finance Act not overriding Section 11A of the CE Act was concerned, Mr.Srinivas, said that the submission made, in that behalf, is no longer res integra, as the decision in the case of J.K. Spinning and Weaving Mills Ltd. and Another V. Union of India and Others, 1987 (32) ELT 234 (SC) had been distinguished by the Supreme Court in R.C. Tobacco Pvt. Ltd. V. Union of India, 2005 (188) ELT 129 (SC). The learned counsel further submitted that the view taken in R.C.Tabacco Private Limited case has been reiterated by the Supreme Court in Dharampal Satyapal Ltd. V. Dy. Commissioner of Central Excise, Gauhati, 2015 (320) ELT 3 (SC).

10.2. Furthermore, learned counsel, in support of this submission, also relied upon the judgement of the Supreme Court in Sangam Spinners Ltd. V. Union of India, 2011 (266) ELT 145 (SC) and Ester Industries Limited V. Union of India, 2016 (338) ELT 246 (Del.).

10.3. In so far as the judgement of the Supreme court in Jindal Poly Films Ltd. is concerned, according to the learned counsel, the said judgement would have no application qua the period in issue, as the issue involved is governed by the provisions of Section 87 of the Finance Act.

10.4. Lastly, as regards, the submission of Mr.Saravanan that Section 87 would only validate those actions for recovery which had already been initiated, it was submitted that the said submission was misconceived, for the reason that, the provision

not only made the restriction, imposed by notification, dated 03.05.1997, retrospective, by deeming fiction, but also validated, in addition, actions already taken for recovery of excess credit taken by the Assessee.

REASONS :

11. We have heard the learned counsel for the parties and perused the record.

11.1. According to us, it is quite clear, on a perusal of the record that the Appellant/Assessee had claimed MODVAT credit on Furnace oil at the rate of 15% ad valorem, based on the Notification dated 01.03.1994. A bare perusal of this notification would show that it was issued under Rule 57A of the 1944 Rules. Therefore, the assertion made on behalf of the Appellant/Assessee that neither the later notification dated 03.05.1997, whereby, the credit was restricted to 10% ad valorem, nor the provisions of Section 87 would impact the Appellant/Assessee, is a submission, which, in our view, is completely unsustainable.

11.2. As a matter of fact, based on the restriction brought about by the latter notification, i.e., notification dated 03.05.1997, the Appellant/Assessee, in its reply dated 26.03.1998, had indicated to the Department that it had "expunged" credit amounting to Rs.2,54,701/- for the period spanning between 03.05.1997 and 19.06.1997. In this behalf, the Appellant/Assessee had given reference to the notification dated 03.05.1997. Therefore, in our view, the Appellant/Assessee cannot contend to the contrary, as it would be inconsistent with the record obtaining in the case.

11.3. Quite clearly, Section 87 of the Finance Act, enhances the period of impact contemplated under Notification dated 03.05.1997 as it brings, also, within its fold the period spanning between 23.07.1996 and 03.05.1997. Therefore, as per provisions of Section 87 of the Finance Act, the restriction on claiming MODVAT Credit would apply for the said period, as well.

11.4. The argument, however, advanced by the Appellant / Assessee is that Section 87 of the Finance Act cannot override the provision of Section 11A of the CE Act. In this connection, one would have to peruse the SCN dated 01.11.1997. A perusal of the SCN would show that the demand period spans between 23.07.1996 and 02.05.1997. The SCN does not, quite clearly, invoke the extended period, as there is no allegation of fraud, collusion, willful misrepresentation, suppression of facts or infraction of the provisions of the CE Act or rules made

thereunder, with the intent to evade payment of tax/duty.

11.5. The issue, which arises, therefore, for consideration, is as to whether the duty for the period in issue, i.e., 23.07.1996 to 28.02.1997 could be sustained.

11.6. For this purpose, learned counsel for the Appellant/Assessee relied upon the judgement of the Supreme Court in J.K. Spinning and Weaving Mills Ltd. and Another V. Union of India and Others, 1987 (32) ELT 234 (SC).

11.7. Therefore, necessarily, the facts obtaining in the said case will have to be noticed.

11.8. In the said case, the Appellant, i.e., J.K. Spinning and Weaving Mills Limited (in short 'JK') was manufacturing various types of fabrics. In order to manufacture the fabrics, JK had to obtain yarn at an "intermediate stage". The yarn so obtained was subjected to an integrated process in a composite mill for weaving the said yarn into fabric. The Department sought to levy duty, in respect of yarn, which was obtained at the intermediate stage as well, and thereafter, subjected to integrated process for manufacture of various kinds of fabric. This was resisted by JK. The Department, towards this end, relied upon a Circular dated 24.09.1980, to interpret Rules 9 and 49 of the 1944 Rules (as they obtained at the relevant point in time), in a manner, which empowered the Excise authorities to levy duty even on yarn generated at the intermediate stage. Since, the said Circular was so interpreted by the Excise authorities, albeit, to the detriment of JK, a writ petition was instituted by it in Delhi High Court.

11.9. During the pendency of the writ petition, the Central Government issued a Notification No.20/82-CE, dated 20.02.1982, whereby, Rules 9 and 49 were amended. Furthermore, via Section 51 of the Finance Act, 1982, it was provided that the amendments made to Rules 9 and 49, "shall be deemed to have and to have always had the effect on and from the date on which the rules came into force". The said rules came into force on 28.02.1944. In other words, the amendments were given retrospective effect.

12. Consequently, JK amended its pending writ petition and challenged the constitutional vires of the Finance Act, 1982, along with amended Rules 9 and 49. Both, the High Court and the Supreme Court upheld the constitutional validity of Rules 9 and 49, as also, of Section 51 of the Finance Act, 1982. However, in so far as the applicability of Section 11A of the CE Act was concerned, the Supreme Court made the following observations in paragraph 30 and 31 of its judgment :

"..... 30. The apprehension of the appellants is

that the amendments to Rules 9 and 49 having been made retrospective from the date the rules were framed, that is, from February 28, 1944, the appellants and others similarly situated may be called upon to pay enormous amounts of duty in respect of intermediate goods which have come into existence and again consumed in the integrated process of manufacture of another commodity. There can be no doubt that if one has to pay duty with retrospective effect from 1944, it would really cause great hardship but, in our opinion, in view of Section 11A of the Act, there is no cause for such apprehension. Section 11A(1) of the Act provides as follows:-

"11-A. (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months 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 misstatement 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 'six months', the words 'five years' were substituted.

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 six months or five years, as the case may be."

31. Under Section 11-A(1) the Excise Authorities cannot recover duties not levied or not paid or short-levied or short-paid or erroneously refunded beyond the period of six months, the proviso to Section 11-A not being applicable in the present case. Thus although Section 51 of the Finance Act, 1982 has given retrospective effect to the amendments of Rules 9 and 49, yet it must be subject to the provision of Section 11-A of the Act. We are unable to accept the

contention of the learned Attorney-General that as Section 51 has made the amendments retrospective in operation since 28-2-1944, it should be held that it overrides the provision of Section 11-A. If the intention of the legislature was to nullify the effect of Section 11-A, in that case, the legislature would have specifically provided for the same. Section 51 does not contain any non obstante clause, nor does it refer to the provision of Section 11-A. In the circumstances, it is difficult to hold that Section 51 overrides the provision of Section 11-A."

13. Mr.Srinivas, has however, argued that the judgement of the Supreme Court in JK case, is distinguishable, in as much as while Section 51 of the Finance Act, 1982 made a declaration that the amended Rules 9 and 49 would apply retrospectively, it did not provide for a recovery mechanism and the period, within which, recovery could be made, and therefore, it was on this account that the Court observed that the period of limitation provided in Section 11A of the CE Act could not be overridden.

14. In order to appreciate this submission, the provisions of Section 51 of the Finance Act, 1982, would be required to be noticed:

"51. Retrospective effect for certain amendments to Central Excise Rules and Validation :-

(1) The amendments made in Rules 9 and 49 of the Central Excise Rules, 1944, by the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.G.S.R.74(E) dated the 20th day of Feb., 1982, shall be deemed to have, and to have always had, effect on and from the date on which the Central Excise Rules, 1944, came into force.

(2) Any action or thing taken or done or purporting to have been taken or done before the 20th day of Feb., 1982 under the Central Excise Act and the Central Excise Rules, 1944 shall be deemed to be, and to have always been, for all purposes, as validly and effectively taken or done as if the amendments referred to in sub-section (1) had been in force at all material times, and accordingly, notwithstanding anything contained in any judgment, decree or order of any court, Tribunal or other authority -

(a) xxxxx

(b) xxxxx

(c) xxxxx

(d) recovery shall be made of all such duties of excise which have not been collected or, as the case may be, which have been refunded but which would have been collected or, as the case may be, would not have

been refunded, if the amendments referred to in sub-section (1) had been in force at all material times.

Explanation - For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force."

14.1. This provision would have to be examined along side the relevant provisions of Section 87 of the Finance Act. For the sake of convenience, the relevant parts of Section 87 are also set out hereafter :

"87. Provisions as to duties of excise on specified petroleum products in relation to a certain period and validation - (1) The notification of the Government of India in the Ministry of Finance (Department of Revenue) No.G.S.R.240(E), dated the 3rd day of May, 1997, which was issued in exercise of the powers conferred by rule 57A of the Central Excise Rules, 1944, to restrict credit of duties paid on specified petroleum products used as inputs in the manufacture of final products shall-

(a) be deemed to have, and to have always had, effect on and from the 23rd day of July, 1996; and

(b) be deemed to prevail, and to have always prevailed, over all notifications issued on or after the 23rd day of July, 1996, but before the 3rd day of May, 1997, under rule 57A of the said rules in relation to specified petroleum products.

Explanation - For the purposes of this section, "specified petroleum products" means naphtha, furnace oil, low sulphur heavy stock light diesel oil, bitumen and paraffin wax falling under Chapter 27 of the Schedule to the Central Excise Tariff Act, 1985.

(2) xxxxx

(a) xxxxx

(b) xxxxx

(c) recovery shall be made of the credit of duties, which have not been restricted but which would have been so restricted if the provisions of this section had been in force at all material times, within a period of ninety days from the date of enactment of this Bill and in the event of non-payment of such credit of duties within this period, in addition to the amount of credit of such duties recoverable, interest at the rate of eighteen per cent annum shall be payable, from the date immediately after the expiry of the said period of ninety days till the date of payment.

Explanation - xxxxx"

14.2. A careful comparison of Section 51(2)(d) of the Finance Act, 1982, with Section 87(2)(c) of the Finance Act, would show that, while, in the latter, a time frame of ninety (90) days from the date of enactment of the Bill is provided, as the period, within which, recovery of excise credit is required to be made, no such period has been provided in the former. Section 51(2)(d) of the Finance Act, 1982, simply, states that recovery shall be made of all such duties of excise, which have not been collected, or, those, which have been refunded, but ought to have been collected, or, even those that would not have been refunded, in case, amendments made, as referred to in Sub-section (1) of Section 51, had been in force at all material times.

14.3. As a matter of fact, under clause (c) of Sub-section 2 of Section 87 of the Finance Act, apart from providing a period within which, recovery is to be made, it is also indicated that in case of non-payment of such excise credit, within the prescribed period, the same would be recovered with interest at the rate of 18% per annum. The interest, as per the said provision, would run from the date immediately following the expiry of the prescribed period of ninety (90) days. The interest, in effect, is payable from that date, till the date of recovery of excise credit.

15. Somewhat, similar issue came up for adjudication before the Supreme Court in the judgement rendered in: R.C.Tobacco Private Limited case. The Supreme Court distinguished its own judgement in J.K. Case, by relying upon a pari materia provision, which provided a definitive period for recovery. Based on the said provision, the Supreme Court came to the conclusion that Section 11A of the CE Act would have no application.

15.1. Briefly, the facts obtaining in the R.C. Tobacco Private Limited case were as follows :

15.2. The Central Government had issued exemption Notification No.32/99-C.E., dated 08.07.1999, under Section 5A of the CE Act. The Assessee before the Court were industries, which were involved in manufacture of cigarettes. The Assessee were, in fact, carrying out job work for large tobacco companies, and for this purpose, they had set up units, based on agreements entered into with such companies for production of cigarettes under their brand names.

15.3. It appears that prior to the aforementioned

notification, in December 1997, the Government of India had announced a separate industrial policy for the North Eastern Region of the country. The policy targeted "synergetic" development of industries in the region, by giving them various incentives, which included exemption from excise duty. For this purpose, a number of notifications were issued by the concerned Ministries in the Government of India.

15.4. In so far as the petitioners before the Supreme Court were concerned, they had set up units in "specified growth centres" and, thus, proceeded to claim benefit under the notification, i.e., Notification No.32/99-C.E., dated 08.07.1999. The procedure established under the notifications was that the manufacturer, in the first instance, had to pay the excise duty, and thereafter, claim refund. In the facts of that case, the petitioners were, over a period of time, granted refund of excise duty, which was stopped thereafter.

15.5. Being aggrieved, the petitioners preferred writ petition before the Guwahati High Court. Pending adjudication of the writ petition, via Notification No.1/2001, dated 22.01.2001, the exemption was withdrawn.

15.6. The facts, set out in the judgement, indicate that the writ petition was allowed by the Single Judge, who held that the petitioners were entitled to refund of excise duty on cigarettes manufactured from the date of commercial production, till the date, when, the benefit was withdrawn, in January 2001 by the Central Government.

15.7. In appeal, the Division Bench confirmed the judgement of the Single Judge. It appears that, immediately, after the judgement of the Division Bench dated 04.04.2003, the Finance Act, 2003, was enacted by the Parliament.

15.8. Via the Finance Act, 2003, the notification dated 08.07.1999, was amended with retrospective effect. Under Sub-Section 4 of Section 154 of the Finance Act, 2003, a provision was made for recoveries, albeit, within a period of thirty (30) days from the date, on which, the Finance Bill, 2003, received the assent of the President.

15.9. It is, in the background of these facts, that the Supreme Court, when, confronted with its earlier decision rendered in J.K. case, concerning the application of Section 11A of the CE Act, made the following observations :

".... 34. The next challenge of the petitioners is based on Section 11-A of the Act, the relevant extracts of which reads:

"11-A. Recovery of duties not levied or not paid

or short-levied or short-paid or erroneously refunded.-

- (1) xxxxx
Provided that xxxxx
- (2) xxxxx
- (3) xxxxx
- (i) xxxxx
- (ii) 'relevant date' xxxxx
- (a) xxxxx
- (A) xxxxx
- (B) xxxxx
- (C) xxxxx
- (b) xxxxx
- (c) xxxxx

35. The contention is that Section 154 violates Section 11-A in that it does not envisage the service of any notice and it seeks to allow recoveries to be made after the periods of limitation provided.

36. According to the respondents the refunds granted under the notifications dated 8-7-1999 were not the "normal" refunds made under the Act but were of a special kind for which the complete machinery was provided under the notifications. The submission is that since the exemption notifications themselves had been withdrawn by Section 154, the amounts refunded thereunder were recoverable independently of Section 11-A under Section 154(4).

37. There are two aspects to this dispute. The first is the question of limitation and the second the question of notice. As far as the first aspect is concerned, refund of duty under the Act has been provided for by Section 11-B. The section specifies the manner and circumstances under which refunds of duty may be made. It is neither of the parties' case that the refund made to the petitioners of the excise duty paid by them was under this section.

38. xxxxx

39. xxxxx

40. Although Section 11-A does not refer to Section 11-B, it speaks of duties "erroneously refunded". It cannot therefore refer to the refunds made to the petitioners under the notifications as there was no error in the provisional refunds made under the notifications to the appellants. What was sought to be recovered under Section 154 was not an erroneous refund but a benefit provisionally granted.

41. In J.K. Cotton Spg. & Wvg. Mills Ltd. v. Union

of India, 1987 Supp SCC 350, relied upon by the petitioners, by virtue of the retrospective amendment of Rules 9 and 49 of the Central Excise Rules in 1982, commodities obtained at an intermediate stage of manufacture in a continuous process were deemed to have been "removed" within the meaning of Rule 9(1) thereby making such intermediate products dutiable under the Act with effect from the commencement of the Act i.e. 1944. In this context the Court held that the amended Rules 9 and 49 would take effect subject to Section 11-A. The decision is distinguishable. The circumstances in which the Court held that the demands for duty could only be limited to six months prior to the amendment was unquestionably different from those present in the case before us. What we have to consider here is whether the benefit granted in 1999 could be withdrawn in 2003. Besides, the Court in J.K. Cotton Spg. & Wvg. Mills Ltd. case, 1987 Supp SCC 350, rejected the contention of the Union of India that Section 51 of the 1982 Finance Act by which the amendments were made to Rules 9 and 49 overrode the provisions of Section 11-A saying: (SCC p. 363, para 32) "If the intention of the legislature was to nullify the effect of Section 11-A, the legislature would have specifically provided for the same". Similarly our decision in National Agricultural Coop. Marketing Federation of India Ltd. v. Union of India, (2003) 5 SCC 23, which dealt with an amendment to Section 80-P(2)(a)(iii) of the Income Tax Act, 1961 noted that 'the amendment does not seek to touch on the periods of limitation provided in the Act, and in the absence of any such express provision or clear implication, the legislature clearly could not be taken to intend that the amending provision authorises the Income Tax Officer to commence proceedings which before the new Act came into force, had, by the expiry of the period provided become barred.' In the present case Section 154(4) specifically and expressly allows amounts to be recovered within a period of thirty days from the day Finance Bill, 2003 received the assent of the President. It cannot but be held therefore that the period of six months provided under Section 11-A would not apply."

(Emphasis is ours)

16. Furthermore, a similar plea was sought to be raised by an Assessee in the case of: Dharampal Satyapal Ltd. V. Dy. Commr of C.Ex., Gauhati, 2015 (320) ELT 3 (SC), where, the Supreme Court reiterated the view taken in R.C. Tobacco Private Limited case. For the sake of convenience, the observations made by the

Supreme Court in paragraph 40 of the judgment are set out hereafter :

"40. With this we advert to the last submission of Mr Sorabjee that the judgment in R.C. Tobacco, (supra) (which is a two-Judge Bench decision) is in conflict with the three-Judge Bench judgment in J.K. Cotton (supra). This argument is not even open to the appellant for the simple reason that the judgment in J.K. Cotton (supra), was specifically taken note of and discussed in R.C. Tobacco (supra). Para 13 of the judgment in R.C. Tobacco (supra) would reflect that the appellant therein had specifically relied upon the judgment in J.K. Cotton (supra), in support of the submission that retrospectivity was harsh and excessive since there is, in fact, a retrospective imposition of excise duty. It was also argued that justification of such retrospective imposition of tax must be overwhelming and no such overriding consideration had been disclosed. The submission went to the extent of pleading that if the appellant is called upon to pay the excise duty now it will cripple its unit. More pertinent was another submission, which is relevant for our purpose, that the demand which was raised could not be sustained as it was made without issuing any show-cause notice and was in contravention of Section 11-A of the Act. In support of this view, a few judgments, including J.K. Cotton (supra), were relied upon. The Court, however, did not find any merit in the aforesaid submissions and dealt with the issue as under, duly taking note of the judgment in J.K. Cotton (supra) :

"40. In J.K. Cotton Spg. & Wvg. Mills Ltd. v. Union of India, 1987 Supp SCC 350, relied upon by the petitioners, by virtue of the retrospective amendment of Rules 9 and 49 of the Central Excise Rules in 1982, commodities obtained at an intermediate stage of manufacture in a continuous process were deemed to have been 'removed' within the meaning of Rule 9(1) thereby making such intermediate products dutiable under the Act with effect from the commencement of the Act i.e. 1944. In this context the Court held that the amended Rules 9 and 49 would take effect subject to Section 11-A. The decision is distinguishable. The circumstances in which the Court held that the demands for duty could only be limited to six months prior to the amendment was unquestionably different from those present in the case before us. What we have to consider here is whether the

benefit granted in 1999 could be withdrawn in 2003. Besides, the Court in J.K. Cotton Spg. & Wvg. Mills Ltd. case, 1987 Supp SCC 350, rejected the contention of the Union of India that Section 51 of the 1982 Finance Act by which the amendments were made to Rules 9 and 49 overrode the provisions of Section 11-A saying: (SCC p. 363, para 32) 'if the intention of the legislature was to nullify the effect of Section 11-A ... the legislature would have specifically provided for the same.' Similarly our decision in National Agricultural Coop. Mktg. Federation of India Ltd. v. Union of India, (2003) 5 SCC 23, which dealt with an amendment to Section 80-P(2)(a)(iii) of the Income Tax Act, 1961 noted that: (SCC p. 35, para 29)

'The amendment does not seek to touch on the periods of limitation provided in the Act, and in the absence of any such express provision or clear implication, the legislature clearly could not be taken to intend that the amending provision authorises the Income Tax Officer to commence proceedings which before the new Act came into force, had, by the expiry of the period provided become barred.'

In the present case Section 154(4) specifically and expressly allows amounts to be recovered within a period of thirty days from the day Finance Bill, 2003 received the assent of the President. It cannot but be held therefore that the period of six months provided under Section 11-A would not apply.

40A. In the aforesaid scenario, when the Court was conscious of the principle laid down in J.K. Cotton (supra) and explained the same in a particular manner while deciding the appeal in R.C. Tobacco (supra), it cannot be argued that the judgement in R.C. Tobacco (supra) runs contrary to J.K. Cotton (supra)."

(Emphasis is ours)

16.1. Having regard to the aforesaid position, one cannot, but hold that Section 11A of CE Act, would have no application, while, construing the impact of Section 87 of the Finance Act.

16.2. Therefore, the submissions advanced by Mr. Saravanan that the recovery sought to be made is time barred, is unsustainable and is, accordingly, rejected.

17. This brings us to the next submission, which is, that the judgement of the Supreme Court in Jindal Poly Films case. To our minds, as correctly argued by Mr.Srinivas, the judgement in Jindal Poly Films case, will not apply to the period in issue.

17.1. In that case, the Court was dealing with claim for credit of the entire duty paid on inputs qua goods specified under Rule 57B. The Court held that the restriction on duty, which was obtained by a notification issued under Rule 57A would have no applicability.

17.2. In the instant case, the Appellant/Assessee had taken credit on specified duty paid on inputs, for the period in issue, by relying upon the notification dated 01.03.1994, issued under Rule 57A. Therefore, the restriction imposed via the subsequent notification, i.e., Notification dated 03.05.1997, which was given retrospective effect by virtue of provisions of Section 87 of the Finance Act, would apply, in our opinion, contrary to what has been contended on behalf of the Appellant/Assessee. Therefore, the submission of Mr.Saravanan made, in this behalf, will have to be rejected.

18. This brings us to the last submission advanced by Mr.Saravanan on behalf of the Appellant/Assessee that Section 87 of the Finance Act would only validate those actions, if any, which had been initiated for recovery of excise credit taken by an Assessee prior to the enactment of the said provision.

18.1. According to us, this submission is misconceived, as a careful perusal of Section 87 of the Finance Act, would show that it not only impacts the notification dated 03.05.1997, operable with retrospective effect, i.e., from 23.07.1996, but also validates any action or, thing taken or done or purported to have been taken or done on or after 23.07.1996, but before 03.05.1997.

18.2. Therefore, in our view, this submission of Mr.Saravanan will also have to be rejected.

19. Consequently, the question of law framed in the matter would have to be answered in favour of the Revenue and against the Appellant/Assessee.

19.1. It is ordered accordingly.

20. Resultantly, the captioned appeal shall stand dismissed. Consequently, the connected Miscellaneous Petition is also

dismissed. There shall, however, be no order as to costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

gg

To

1. The Customs, Excise & Service Tax Appellate Tribunal,
No.26, Shashtri Bhavan Annexe Building,
Haddows Road, Nungambakkam,
Chennai - 600 006.
2. The Commissioner of Central Excise
Office of the Commissioner of Central Excise,
No.1, Gouber Avenue, Beach Road,
Puducherry-605 001.

+1cc to Mr.C.Saravanan, Advocate, S.R.No.41848

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.41989

C.M.A.No.287 of 2015
and M.P.No.1 of 2015

SVI(CO)
CS/05/07/17

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