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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.1.2020

CORAM

THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.A.Nos.4300 to 4305, 4307, 4308, 4311,
4312, 4320, 4322, 4323, 4324, 4326
and 4327 to 4329 of 2019

and

C.M.P.Nos.27284, 27293, 27292, 27301, 27310,
27316, 27326, 27351, 27425, 27426, 27576,
27602, 27614, 27617, 27623,
27632, 27635 and 27646 of 2019

M/s.Premier Cotton Textiles
rep. by its Senior Manager,
Mr.S.Vaidyanathan
Poolankinar Post,
Udumalpet 642 122.

Appellant in WA 4300 to
4305, 4307, 4308, 4311 & 4312 of 2019

M/s.Prima Products Private Limited,
rep. by its Company Secretary
S.Ganesh
P.B.No.5210, 1 Nava India Road,
Coimbatore 641 028.

Appellant in WA 4320, 4322,
4323, 4324 & 4329 of 2019

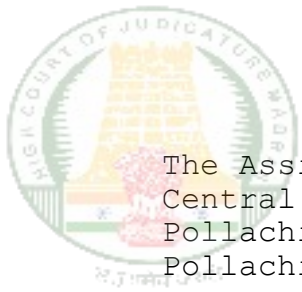
M/s.Premier Mills Private Ltd.,
rep. by its Senior Manager,
Mr.S.Vaidyanathan,
Poolankinar Post,
Udumalpet 642 122.

Appellant in WA 4326, 4327
and 4328 of 2019

Versus

The Commissioner of Central
Goods and Service Tax,
Coimbatore Commissionerate,
GST Bhavan, No.6/7, A.T.Devaraj Street,
Race Course Road, Coimbatore 641 018.

R1 in all the Appeals



The Assistant Commissioner of
Central Goods and Services Tax,
Pollachi Division, Jothi Nagar 'D' Colony,
Pollachi 642 001.

R2 in WA 4300 to 4305,
4307, 4308, 4311, 4312 &
4326, 4327 & 4328 of 2019

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The Assistant Commissioner of
Central Goods and Services Tax,
Tirupur Division, 1st Floor,
Kumaran Shopping Complex,
Tirupur 641 601.

R2 in WA 4320, 4322, 4323,
4324 & 4329 of 2019

Prayer: Writ Appeals filed under Clause 15 of the Letters Patent against the order dated 24.7.2019 in W.P.Nos.22094, 22099, 22090, 22098, 22093, 22097, 22092, 22095, 22091, 22096, 23547, 23549, 23550, 23551, 22202, 22203, 22201 and 23548 of 2018 passed by this Hon'ble court.

Prayer in WPS: Writ Petitions filed under Article 226 of the Constitution of India, praying to issue to prohibit the 2nd respondent from proceeding further pursuant to the impugned show cause notice No.05/2018(AC) dated 20.02.2018 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

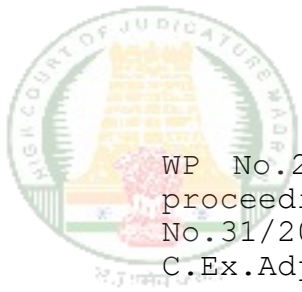
WP No.22099 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.11/2018(AC) dated 17/04/2018 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

WP No.22090 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.25/2017(AC) dated 27.07.2017 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

WP No.22098 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.10/2018(AC) dated 16/04/2018 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

WP No.22093 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.01/2018(AC) dated 24/01/2018 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

WP No.22097 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.09/2018(AC) dated 06/04/2018 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.



WP No.22092 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.31/2017(AC) dated 15.11.2017 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

WP No.22095 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.07/2018(AC) dated 04.04.2018 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

WP No.22091 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.28/2017(AC) dated 11.10.2017 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

WP No.22096 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.08/2018(AC) dated 05/04/2018 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

WP No.23547 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.07/2017(AC) dated 29.03.2017 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

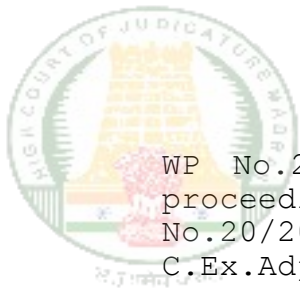
WP No.23549 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.09/2017(AC) dated 29.03.2017 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

WP No.23550 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.10/2017(AC) dated 29.03.2017 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

WP No.23551 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.11/2017(AC) dated 29.03.2017 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

WP No.22202 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.26/2017(AC) dated 27/07/2017 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

WP No.22203 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.32/2017(AC) dated 15.11.2017 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.



WP No.22201 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.20/2017(AC) dated 13.04.2017 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

WP No.23548 of 2018: To to prohibit the 2nd respondent from proceeding further pursuant to the impugned Show Cause Notice No.08/2018(AC) dated 29.03.2017 bearing C.No.V/52/15/09/2017 C.Ex.Adjn.

For Appellant(in all) : Mr.T.Mohan
for Mr.R.Anish Kumar

For R1 & R2(in all) : Mr.A.P.Srinivas
Senior Standing Counsel

COMMON JUDGMENT

(Judgment of the court was made by Dr.VINEET KOTHARI, J.)

The Assessee Company M/s.Premier Cotton Textiles and others have filed the present intra-Court Appeals aggrieved by the order passed by the learned Single Judge dated 24.7.2019.

2. By the impugned order, the learned Single Judge dismissed a batch of Writ Petitions filed by the Assessee Companies and directed the Assessee Companies to appear before the Assessing Authority and show cause in pursuance of the impugned show cause notice issued to the Assessee Companies for recall of the earlier orders by which certain refunds were granted to the Assessee Companies which were erroneous refunds, in the opinion of the Adjudicating Authority, invoking Section 11A of the Central Sales Tax Act.

3. The observation made by the learned Single Judge for rejecting the Writ Petitions are quoted below for ready reference:-

"33. This takes us to the scope of exercise of writ jurisdiction when SCNs are challenged. No elaboration is required to say that the scope of interference in writ jurisdiction is very limited when SCNs are called in question. The exceptions to this rule are very few and in the instant case, as alluded to supra, the exception was projected on the basis of jurisdictional fact. As jurisdictional fact, i.e., preferring an appeal against OIO has been answered against writ petitioners, it follows as a sequiter that this case does not fall in any of the exceptions to the rule of limited and restricted exercise of writ jurisdiction when



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SCNs are assailed in writ jurisdiction.

34 This Court also reminds itself of a judgment of Hon'ble Supreme Court in Kunisetty Satyanarayana case being Union of India v. Kunisetty Satyanarayana reported in (2006) 12 SCC 28, wherein Hon'ble Supreme Court has held that interference in SCNs in writ jurisdiction should be in rare and exceptional cases. Relevant paragraphs are paragraphs 15 and 16 and the same read as follows :

"15.Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.

16.No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter."

(underlining made by this court to supply emphasis and highlight)

35. Owing to the narrative thus far, in the considered view of this Court, instant cases on hand certainly do not fall under rare and exceptional cases warranting interference in impugned SCNs. Though obvious, it is made clear that when adjudication pursuant to impugned SCNs proceed, it will be open to writ petitioners to submit that they have not availed double benefit and obviously, this aspect will also be adjudicated upon on merits. As already alluded to supra, this is one of the main reasons as to why this court has refrained and restrained itself from expressing any opinion on this aspect of the matter. Suffice to say that this Court is informed that Raghav Industries case has been carried in appeal, i.e., intra court appeal vide W.A.No.429 of 2016 and that the same is pending, but there is no disputation that Raghav Industries case has not been stayed.



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36. Sum totality of the narrative thus far and dispositive reasoning set out supra leaves this court with the considered view that impugned SCNs do not deserve to be interfered with and that impugned SCNs have to be carried to their logical end.

37. Consequently, all writ petitions fail and all 18 writ petitions are dismissed. As a result, all writ miscellaneous petitions are dismissed. Considering the nature of the matter, parties are left to bear their respective costs."

4. Learned counsel Mr.Mohan appearing for the Appellant/Assessee vehemently urged before us that the impugned show cause notice was issued by the Authority without jurisdiction as the refunds in question were granted to the Assessee Companies by proper speaking adjudicating orders and therefore, the same Authority could not issue the impugned show cause notice holding such refunds to be erroneously granted to the Assessee Companies and without subjecting those adjudicating orders, to further orders by the higher Authority under Section 35E of the Act, the impugned notices issued under Section 11A of the Act could not have been issued by the Authority concerned. Hence, the Writ Petitions were maintainable before the learned Single Judge and deserved to be allowed. Therefore, the present Appeals filed by the Assessee Companies deserve to be allowed.

5. The learned counsel for the Appellant/Assessee relied upon the following judgments to support his aforesaid contention:-

- i) Eveready Industries India Ltd. v. CESTAT, Chennai (2016(337) ELT 189 (Mad)).
- ii) Commissioner of Central Excise v. Pricol Ltd. (2015 (320) ELT 703(Mad)).
- iii) Madurai Power Corporation (P) Ltd. v. Deputy Commissioner of Central Excise (2008(229) ELT 521 (Mad.).

6. Per contra, the learned Senior Standing Counsel Mr.A.P.Srinivas appearing for the Revenue submitted that Section 35E of the Act has got revisional power conferred upon the Commissioner of Central Excise which can be invoked suo motu by the said Authority and he can call for and examine the record of any proceedings of the subordinate Authority and pass appropriate orders after satisfying himself about the legality or propriety of any such decision or order. He urged that Section 11A of the Act is independent and is not subject to Section 35E of the Act and the said provision of Section 11A of the Act independently empowers the Adjudicating Authority concerned to issue show show cause notices within the limitation prescribed in such Section in case the Authority comes to a



conclusion that where any Duty of Excise has not been levied or has been short levied or has been erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful misstatement or suppression of facts or contravention of provisions of this Act. The limitation for issuance of such show cause notices under Section 11A is two years from the relevant date and in case of suppression or fraud on the part of the Assessee, sub-section (4) provides for a higher limitation of five years from the said relevant date. He submitted that in the present case at the stage of only show cause notice, the Assessee Companies had approached this court by way of Writ jurisdiction and therefore, the learned Single Judge was justified in rejecting the Writ Petitions.

7. The learned Senior Standing Counsel for the Revenue also relied upon the following Judgments of the Hon'ble Supreme Court in support of his contention:-

- i) Grasim Industries Ltd. v. Commissioner of Central Excise, Bhopal (2011 (271) ELT 164(SC)).
- ii) M/s.Geep Flashlight Industries Limited v. Union of India (1983 (13) ELT 1596 (SC))
- iii) Asian Pains (India) Limited v. CCE (2002 (142) ELT 522 (SC)).

8. We have given our earnest consideration to the rival contentions and the aforesaid judgments and the order passed by the learned Single Judge.

9. We are of the considered opinion that the present Appeals do not have any merits and they deserve to be dismissed and the learned Single Judge was right and justified in rejecting the Writ Petitions at the preliminary stage of show cause notice to the Assessee Companies.

10. We find no merit in the contention raised by the learned counsel for the Assessee Companies that without the intervention of the higher Authorities under Section 35E of the Act, the Adjudicating Authority himself could not issue the impugned show cause notice under Section 11A of the Act.

11. On a bare reading of the Scheme of Central Excise Act, 1944 in Chapter II dealing with levy of collection of Duty comprising from Section 3 to 12, we find that the said Chapter contains the provisions relating to charging provisions, Valuation, Assessment and Penalty etc. Section 11A in the said Chapter II pertaining to levy in collection of Duty provides for recovery of Duties not levied or not paid or short levied or short paid by the Assessee or or erroneously refunded to be recalled by the Adjudicating Authority and after issuance of appropriate notice, the proceedings under Section 11A can be decided by the Authority concerned. Relevant portion Section 11A of the Act is quoted below for ready reference:-



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"11A. Recovery of duties not levied are not paid or short levied or short paid or erroneously refunded

(1) Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, for any reason other, than the reason of fraud or 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,--

(a) the Central Excise Officer shall, within two years from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requesting him to show cause why he should not pay the amount specified in the notice;

(b) the person chargeable with duty may, before service of notice under class (a), pay on the basis of --

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 11AA.

(2) The person who has paid the duty under clause (b) of sub-section (1), shall inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty so paid or any penalty leviable under the provisions of this Act or the rules made thereunder.

(3) Where the Central Excise Officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of two years shall be computed from the date of receipt of information under sub-section (2).



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(4) Where any amount of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of--

(a) fraud; or

(b) collusion; or

(c) any wilful mis-statement; or

(d) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,

by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requesting him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice."

12. As against the said provisions Section 11A of the Act, Section 35E of the Act, relied upon by the learned counsel for the Appellant, is also quoted below for ready reference:-

"35E. Power of Committee of Chief Commissioners of Central Excise or Principal Commissioner of Central Excise or Commissioner of Central Excise to pass certain orders

(1) The Committee of Chief Commissioner of Central Excise may, of its own motion, call for and examine the record of any proceeding in which a Principal Commissioner of Central Excise or 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 or any other 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.

PROVIDED that where the Committee of Chief Commissioners of Central Excise differs in its opinion as to the legality or propriety of the decision or order of the Principal Commissioner of Central



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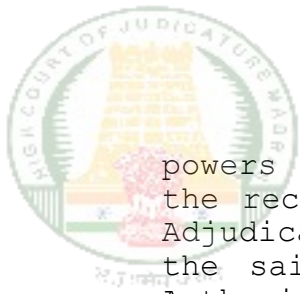
Excise or Commissioner of Central Excise, it shall state the point or points on which it differs and make a reference to the Board which, after considering the facts of the decision or order, if is of the opinion that the decision or order passed by the Principal Commissioner of Central Excise Commissioner or Commissioner of Central Excise is not legal or proper, may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order, as may be specified in its order.

(2) The Principal Commissioner of Central Excise or 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 or any Central Excise Officer subordinate to him 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 Principal Commissioner of Central Excise or Commissioner of Central Excise in his order.

(3) Every order under sub-section (1) or sub-section (2), as the case may be, shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority.

PROVIDED that the Board may, on sufficient cause being shown, extend the said period by another thirty days."

13. On a bare perusal of these provisions, we may see that para 35E of the Act contained in Chapter VI-A deals with the Appeal remedy provided to the aggrieved persons and the revisional powers comprising of Section 35 to 36 of the Act. Section 35 of the Act has various provisions running from 35A to 35R in the said Chapter VIA of the Act. The suo motu power of the Principal Commissioner of Central Excise or Committee of Chief Commissioners, with effect from the amended provisions of Finance Act, 2005 dated 13.5.2005 deals with the revisional



powers conferred upon such Committee to call upon and examine the record of any proceedings in which a lower Authority, as an Adjudicating Authority, has passed any decision or order under the said Act for the purpose of satisfying the said higher Authority as to the legality or propriety of such decision or order and such higher Authority, by an appropriate order, direct the lower Authority to pass appropriate orders in accordance with the directions given in such orders passed under Section 35E of the Act.

14. This is a usual revisional power conferred on the higher Authority of the Revenue to supervise and monitor the proceedings and decision of the lower Authority to protect the interest of the Revenue. The powers under Section 11A of the Act conferred upon the Adjudicating Authority himself do not depend, in any manner, upon the exercise of revisional power under under Section 35E of the Act. The contention of the learned counsel for the Appellant/Assessee is, therefore, fallacious and contrary to the bare reading of the provisions of the Act itself.

15. If the exercise of jurisdiction under Section 11A of the Act was to be hooked or hinged upon the provisions of Section 35E of the Act, that would frustrate the very provisions of Section 11A of the Act, in our opinion. Section 11A of the Act does not refer or make it subject to any other provisions of Chapter VIA of the Act providing for Appeal or revisional powers to the higher Authority under the said Act. Therefore, to make an exercise of power under Section 11A of the Act, dependent upon the outcome of an order of higher Authority will render the provisions nugatory. Therefore, to contend on that basis that the impugned Show Cause Notice could not have been issued by the Authority and they should be held without jurisdiction is a preposterous contention and the same cannot be accepted. We reject the same.

16. What we have stated above is clearly supported by the Judgments of the Hon'ble Supreme Court relied upon by the learned counsel for the Revenue. In *Grasim Industries Ltd. v. Commissioner of Central Excise, Bhopal* (2011 (271) ELT 164(SC)), in para 13, the Hon'ble Apex Court has clearly laid down that Section 11A of the Act provides for right of issuance of show cause notice, if, according to the Department, Duty of Excise has been erroneously refunded to a party. In the event of such refund of Excise Duty, the Competent Authority may issue such show a cause notice provided under Section 11A of the Act in which case, the Assessee as to show cause as to why the amount of refund, which was erroneously refunded, should not be recovered and in such cases, there is no question of filing any Appeal, as appropriate remedy is provided under Section 11A of the Act. The negation of the contention like the one raised before us by the words "there is no question of filing any Appeal" will be equally a bar to go for the revisional powers under Section 35E



of the Act.

17. We fail to understand how the suo motu revisional powers conferred upon the higher Commissioner(s) can be forcibly invoked by the Assessee or by Adjudicating Authority at his stance before a Show Cause Notice under Section 11A of the Act can be issued by the Authority concerned.

18. In M/s.Geep Flashlight Industries Limited v. Union of India (1983 (13) ELT 1596 (SC)), the Hon'ble Supreme Court, in para 19 and 24, while dealing with the the provisions of Section 128 of the Customs Act, 1962 held as under:-

"19. The contention of the appellant that refund will also be a case of short-levy is not correct. Section 28 speaks of three kinds of errors in regard to duties. One is non-levy, the second is short-levy and the third is erroneous refund. Levy is linked to assessment. Section 17 of the Act speaks of assessment order. In the process of assessment two kinds of errors may occur. One is non-levy and the other is short-levy. Refund is dealt with in Section 27 of the Act. The expression "erroneously refunded" means refunded by means of an order which is erroneously made. These are three categories of errors in regard to duties.

... ..

24. The appellant's prayers for writs of certiorari and mandamus are misconceived. There is no order either judicial or quasi-judicial which can attract certiorari. No mandamus can go because there is nothing which required to be done or forborne under the Act. The issue of the notice in the present case requires the parties to represent their case, there is no scope for mandamus to do any duty or act under the statue. A writ of prohibition cannot be issued for the obvious reason that the Central Government has jurisdiction to revise."

19. Thus, the aforesaid Judgments also holds that the Assessee's prayers for writ of certiorari and mandamus in such cases was misconceived.

20. As against this, the Judgments relied upon by the learned counsel for the Appellant/Assessee, do not advance the case of the Appellant/Assessee at all.

21. In Eveready Industries India Ltd. v. CESTAT, Chennai (2016(337) ELT 189 (Mad)) (supra), vide para 36 to 39 of the



said Judgment, the Court held that an order for recovery can be passed under Section 11A of the Act 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 of the Act whereas 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 a higher Authority viz., the Deputy Commissioner under sub-section (2) of Section 11B and therefore, the Court held that hypothetically, it would mean that a Deputy Commissioner can pass an order for refund under Section 11B(2) and a lower Authority viz., an Assistant Commissioner can invoke the proceedings for recovery under section 11A(1) of the Act, which the court found to be impermissible and while saying so, the court referred to the provisions of Section 11A and Section 35E of the Act also in para 37. The said portion of the Judgment is quoted below for ready reference:-

"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 recognising 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



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the path of adjudicating authority. This power is available only for directing be 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."

22. There are no such facts available in the present cases before us. In that case, though the lower Authority has issued an impugned show cause notice under Section 11A of the Act after, by an adjudication order, a higher Authority had granted refund to the Assessee under Section 11B of the Act. Therefore, the said Judgment will not be helpful to the learned counsel for the Assessee.

23. In *Madurai Power Corporation (P) Ltd. v. Deputy Commissioner of Central Excise* (2008(229) ELT 521 (Mad.)), another Bench of this Court held in para 23 of the said Judgment that there is no nexus between Section 11A and 35E of the Act and Section 11A of the Act does not indicate that the legislature intended to override Section 35E of the Act and both the Sections have to be read harmoniously and since in the present case before court, Annexure I was issued to the Petitioner 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 and 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 lower Authority to invoke Section 11A of the Act. Again no such facts are available in the present said of facts before us.

24. On the other hand, we respectfully agree with the observation made by the coordinate Bench that there is no conflict between the two provisions viz., Section 11A and 35E of the Act and both of them have to be read together harmoniously as indicated above. The Scheme of the Act in Chapter II of the Act thus are independent and there is no conflict of these two provisions.



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25. The Hon'ble Supreme Court in *Asian Paints (India) Limited v. CCE* (2002 (142) ELT 522 (SC)) held by their order reiterated same position in the available words:-

"We have ready the judgements of the Larger Bench of the Customs Excise and Gold (Control) Appellate Tribunal, which are impugned in these Appeals. We are of the view that the judgments viewed Sections 35E and 11A of the Central Excise Act in the proper perspective. The two sections operate in different fields and are involved for different purposes. Different time limits are, therefore, set out therein. We do not accept the contention that recovery of excise duty cannot be made pursuant to an appeal filed after invoking the provisions of Section 35E if the time limit provided in Section 11A has expired. To so read the provisions would be to render Section 35E virtually ineffective, which would be impermissible.

2. The appeals are dismissed with costs."

26. Therefore, in view of the aforesaid, we are of the clear opinion that the learned Single Judge was perfectly justified in relegating the Petitioner/ Assessee before the Authority concerned, who issued the impugned show cause notices where the Assessee had to avail the opportunity to show cause before the Authority concerned that the refund in question was not erroneously made earlier so as to justify a recall or refund back to the Department under Section 11A of the Act.

27. Without showing cause before the Authority concerned himself and directly approaching the Writ Court invoking extraordinary jurisdiction under Article 226 of the Constitution of India, in our opinion, is nothing, but an abuse of process of law. The Constitutional Courts, in the absence of proper factual foundation and findings, should not be flooded with premature Writ Petitions and such practice on the part of the Assessee deserves to be strongly put down with the iron hands of justice.

28. The multiplicity of cases in the Constitutional Courts takes years to even send back the Assessee to square One, where he should have, in all fairness, originally gone. In the meantime, the Authorities are deprived of their justifiable jurisdiction and to pass appropriate orders after giving proper opportunity of hearing to the Assessee concerned and the Government is deprived of its Revenue.



29. Therefore, we dismiss the present Writ Appeals. No order as to costs. Consequently, the connected Miscellaneous Petitions are also dismissed.

Sd/-

Assistant Registrar (CO-MDU)

//True Copy//

Sub Assistant Registrar

ssk.

To:

1. The Commissioner of Central Goods and Service Tax,
Coimbatore Commissionerate,
GST Bhavan, No.6/7, A.T.Devaraj Street,
Race Course Road, Coimbatore 641 018.
2. The Assistant Commissioner of Central Goods and Services Tax,
Pollachi Division, Jothi Nagar 'D' Colony,
Pollachi 642 001.
3. The Assistant Commissioner of Central Goods and Services Tax,
Tirupur Division, 1st Floor,
Kumaran Shopping Complex,
Tirupur 641 601.

+18cc to Mr.R.Anishkumar, Advocate SR.5773

+1cc to Mr.AP.Srinivas, Advocate SR.4707

W.A.No.4300/2019 & batch

GJI (CO)
CB(01/07/2020)