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Delivered on 17.12.2019

Court No. - 35**Case :-** WRIT TAX No. - 147 of 2018**Petitioner :-** M/S Honda Siel Power Products**Respondent :-** Union Of India Through Secy. And Another**Counsel for Petitioner :-** Nishant Mishra, Tarun Gulati, Vinayak Mathur**Counsel for Respondent :-** A.S.G.I., Anant Kumar Tiwari, B.K. Singh Raghuvanshi**Hon'ble Bharati Sapru, J.****Hon'ble Rohit Ranjan Agarwal, J.****(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)**

1. Heard Sri Tarun Gulati, learned Senior Counsel assisted by Sri Vipin Upadhyay and Sri Nishant Mishra, learned counsel for the petitioner, Sri B.K.S. Raghuvanshi and Sri Anant Kumar Tiwari, learned counsel for the respondents-department.
2. Present petition has been filed seeking a writ of certiorari for quashing show-cause notice dated 17.08.2017 and order dated 30.11.2017, and also for writ of mandamus restraining respondents from enforcing demands in respect of repayment of refund received by petitioner.
3. Facts in brief are that petitioner is a Company incorporated under the Companies Act, 1956 and is engaged in manufacture of portable gensets and IC engine falling under Chapter Heading No. 85 and 84 of First Schedule to Central Excise Tariff Act, 1985.
4. Dispute relates to period 2014-15. According to petitioner, it applied for provisional assessment of excise duty under Rule 7 of Central Excise Rules, 2002 (hereinafter called as "Rules") on 01.04.2014. The Excise Commissioner, Central Excise,

Division II accepted the request of petitioner for provisional assessment and intimated the same on 31.07.2014. The said correspondence is on record as Annexure-5. Petitioner-Company, thereafter, filed an application for finalisation of provisional assessment on 19.06.2015.

5. Provisional assessment was finalised for period 2014-15 by Assistant Commissioner on 24.07.2015, copy of said order is on record as Annexure-8. According to provisional assessment order, an amount of Rs.17,89,42,303/- was passed on to customer and excise duty deposited to the tune of Rs.1,02,75,633/- was in excess. Assistant Commissioner further held after examining certificate submitted by CA of petitioner-Company that principle of unjust enrichment was not applicable to facts of the case. Order of provisional assessment became final as the department did not prefer any appeal as contemplated under Section 35E read with Section 35 of Central Excise Act, 1944 (for short "Excise Act").

6. After finalisation of provisional assessment, petitioner-Company applied for refund. Again after adjudication of refund, on 05.11.2015 refund claim was sanctioned under Section 11B of Excise Act. The adjudication of refund order also took note of the fact that unjust enrichment did not apply to facts of the case. This order was also appealable under Section 35E read with Section 35 of Excise Act but no appeal was preferred by department and it attained finality.

7. In one of the matters **CCE, Madras vs. Addison and Company, (2016) 10 SCC 56**, the Apex Court held that

principle of unjust enrichment applied in a case where manufacturer had failed to establish that burden of duties had not been passed on to the ultimate buyer. On the basis of said judgment, respondent no. 2 issued show-cause notice to petitioner-Company on 17.08.2017, that is after more than two years, asking why amount of Rs.1,02,75,633/- which was erroneously refunded, should not be recovered and credited to the Consumer Welfare Fund. Reply was filed by petitioner-Company on 09.10.2017 and written submission were submitted on 30.10.2017, taking specific objection that proceedings seeking to reopen concluded proceedings on the basis of unconnected and subsequent Supreme Court judgment was without jurisdiction and ought to be dropped.

8. Respondent no. 2 on 30.11.2017 held the petitioner liable for refund of the amount being unjust enrichment, since petitioner was not able to prove that burden of duty was not passed on by dealers/ distributors to their customers.

9. Counsel for the petitioner submitted that revenue did not file any appeal against finalisation of provisional assessment order dated 24.07.2015 wherein it was held that unjust enrichment is inapplicable. Further, no appeal was preferred against order dated 05.11.2015, whereby refund of excess excise duty was paid to petitioner, and thus, it attained finality. It is contended that by issuing show-cause notice dated 17.08.2017 seeking to reopen the proceedings and, thereafter, by passing order impugned dated 30.11.2017, the respondent authorities had committed gross illegality to question the correctness of earlier orders which had become final. Reliance

placed by department on the decision of the Apex Court in case of ***Union of India vs. Jain Shudh Vanaspati, 1996 (86) ELT 460 (SC)*** cannot be applied in the present case, as said case relates to fraud which is not alleged in the present case. It is further contended that Section 35E of Excise Act provides that power of review is available with the Commissioner under which it can be directed that an appeal against any order be filed by department. As orders dated 24.07.2015 and 05.11.2015 whereby provisional orders were finalised and refund was granted, also qualifies as order passed under the Act, and respondents were entitled to file an appeal against such orders. In absence of any appeal, these orders attained finality and cannot be reopened by starting collateral proceedings by issuance of show-cause notice under Section 11A of Excise Act, as provisions of Section 11A applies *inter alia* in case when there is a grant of “erroneous refund”, while in the present case refund was granted in accordance with orders passed which attained finality and cannot be termed as erroneous to invoke Section 11A.

10. Reliance has been placed upon a judgment of Madras High Court in case of ***Eveready Industries Ltd. vs. Cestat, Chennai 2016 337 ELT 189 (Mad. HC)***, wherein it has been held that once refund is allowed, then parallel proceedings by way of issuance of show-cause notice under Section 11A of the Act can not be initiated. Relevant Paras 48 and 49 are extracted hereasunder:-

“48. In other words, two valuable rights, one in the form of right of appeal and another in the form of order of refund, are now sought to be taken away indirectly

by taking recourse to Section 11A. What cannot be done directly cannot be done indirectly also.

49. In so far as the decision of the Andhra Pradesh High Court is concerned, one observation made in paragraph 16 of the said decision is of prime importance. In paragraph 16, the Andhra Pradesh High Court has made it clear, after analysing Sections 11A and 11B that there is an adjudication process involved in the processing of applications made under Sections 11A and 11B. The Andhra Pradesh High Court held that orders passed under Sections 11A and 11B are appealable. Therefore, the decision of the Andhra Pradesh High Court, especially the observation in paragraph 16, should be made use of by the assessee to contend that since there was no appeal against the order under Section 11B, the Department cannot take recourse to Section 11A.”

11. In case of ***CCE and C, Tirupati vs. Panyam Cements and Minerals Industries Ltd. 2016 (331) ELT 206 (AP)***, the Andhra Pradesh High Court took a view that once the department failed to file an appeal, it would be incorrect to start collateral proceedings by issuance of show-cause notice under Section 11A of the Excise Act.

12. Apex Court in case of ***Mafatlal Industries Ltd. Vs. Union of India 1979 (89) ELT 247 (SC)***, while dealing with a situation where a manufacturer pays a duty unquestioningly and his remedy of appeal fails, then after the order becoming final after a lapse of sufficient period, on basis of decision rendered by a High Court or Supreme Court challenges the same on the ground that duty was not payable or was payable at a lesser rate, it was held that manufacturer was not entitled to claim any refund as the adjudication order had become final. In case in hand assessment order as well as refund order having become final, revenue cannot restart the matter by

issuing show-cause notice exercising power under Section 11A of the Act.

13. The second point canvassed by counsel for petitioner is that show-cause notice dated 17.08.2017 was issued after more than two years from finalisation of assessment order dated 24.07.2015 and is barred by limitation. Show-cause notice has been treated from the date of refund order dated 05.11.2015, which is a consequential order after finalisation of assessment, thus, show-cause notice is beyond two years and is barred by limitation. Reliance has been placed upon a decision of the Apex Court in case of **CTO v. Binani Cements (2014) 8 SCC 319**, wherein it has been held that a specific provision relating to a specific and defined subject would prevail over a general provision relating to a broad subject.

14. Sri Gulati further submitted that issuance of show-cause notice by respondent was based on mere change of opinion on the very same facts, only on account of a subsequent decision of Apex Court, which is not applicable in the present case. Issuance of notice under Section 11A amounted to reassessment as held in case of **Shahnaaz Ayurvedics vs. CCE, Noida 2004 (173) ELT 337 (All. HC)**.

15. On question of reassessment, on basis of subsequent decision, reliance has been placed on a decision of Apex Court in case of **CIT vs. Simplex Concrete Piles (2013) 11 SCC 373**, and also on a Division Bench of this Court in case of **Samsung India Electronics Pvt. Ltd. vs. State of U.P. and others, (2016) SCC Online All. 1539** wherein it was held that

subsequent judgment cannot be used to reopen assessment or disturb past assessments. Relevant Para 11 is extracted hereasunder:-

“11. Further, a subsequent judgment cannot be used to reopen assessments or disturb past assessments which have been concluded. [See Para 7, Austin Engineering v. JCIT (2009) 312 ITR 70 (Guj.) Para 4 and 5, Bear Shoes 2011 (331) ITR 435 (Mad.), B.J. Services Co. Middle East Ltd. v. Deputy Director (2011) 339 ITR 169 (Uttarakhand), Sesa Goa v. JCIT 2007 (294) ITR 101 (Bom.), Geo Miller and Co. 2004 (134) Taxman 552 (Cal)]. Reliance is also placed on the decision of the Hon'ble Supreme Court in MEPCO Industries v. CIT, (2010) 1 SCC 434, where the CIT on the basis of a subsequent decision of the Supreme Court sought to rectify his earlier order. The Hon'ble Court held that this would amount to a change of opinion.”

16. Reliance has also been placed on the decision in case of ***CIT vs. Bhanji Lavji (1972) 4 SCC 88, Arun Gupta vs. Union of India (2015) 371 ITR 394 (All. HC)*** (Para 14, 20), ***Calcutta Discount Company Ltd. vs. ITO AIR 1961 SC 372*** and ***Jeans Knit Pvt. Ltd. vs. DCIT Bangalore 2016 SCC Online 1536*** wherein the Courts have held that no reassessment can be made once the proceedings are concluded, merely on the basis of change of opinion.

17. Counsel for the petitioner distinguishing the case of ***Addison and Company*** (supra) relied upon the department while issuing show-cause notice, submitted that the said case is distinguishable on facts. As Hon'ble Apex Court interpreted clause (e) of Proviso to Section 11B and not Clause (d). As in that case no CA certificate was presented by assessee evidencing that incidence of duty lied with assessee, no commercial invoices were issued by applicant to its customers

on which no excise duty was mentioned. While reading Section 11B(2), it is clear that where manufacturer has applied for refund of excise duty, clause (d) of Proviso to Section 11B(2) states that (i) the duty of excise should have been paid by the manufacturer and (ii) such incidence of duty must not have been passed on to any other person. In the present case, it is not in dispute that incidence of excise duty which was initially passed on to dealer was borne by petitioner on issuance of credit notes and discounts on invoices. The Commissioner on the basis of such credit notes and invoices had held petitioner to have paid excess excise duty, thus, the law laid down by Apex Court in case of **Addison and Company** (supra) was not applicable in the present case.

18. Stress was also laid upon the fact that **Civil Appeal No. 8488 of 2009** decided along with case of **Addison and Company** (supra) where credit notes were issued regarding return of excise duty paid and CA certificate was produced, the Apex Court dismissed the appeal of the revenue and allowed refund to assessee. Relevant Paras 38 and 39 are quoted hereasunder:-

“38. The respondent-Assessee is a 100 per cent export-oriented unit (EOU) manufacturing cotton yarn. The respondent filed an application for refund of an amount of Rs. 2,00,827/- on 14.08.2002 on the ground that it had paid excess excise duty @ 18.11 % instead of 9.20 %. The Assessee initially passed on the duty incidence to its customers. Later the Assessee returned the excess duty amount to its buyers which was evidenced by a certificate issued by the Chartered Accountant on 02.08.2002. The refund claim was rejected by the Deputy Commissioner of Central Excise, Kolhapur Division vide an order dated 24.09.2002 on the ground that the Assessee did not submit either the credit notes or the Chartered

Accountant's certificate at the time of filing the refund application. Not satisfied with the genuineness of the documents, the Deputy Commissioner rejected the refund claim. The Commissioner (Appeals) Central Excise, Pune allowed the appeal filed by the Assessee by taking note of the certificate issued by the Chartered Accountant and the credit notes dated 29.07.2002. The Appellate Authority accepted the Assessee's contentions and held that there was no reason to doubt the genuineness of the documents produced. The Appellate Authority allowed the appeal of the Assessee and the said order was confirmed by the Central Excise and Service Tax Appellate Tribunal vide judgment and order dated 06.10.2005. The said order of Central Excise and Service Tax Appellate Tribunal was further confirmed by the High Court of Judicature at Bombay in Central Excise Appeal No. 100 of 2008 filed by the Revenue. The Revenue has filed the above Civil Appeal challenging the validity of the judgment of the High Court in CCE v. Eurotex Industries and Exports Ltd, reported in 2008 SCC OnLine Bom 1578.

39. Except for a factual dispute about the genuineness of the certificate issued by the Chartered Accountant and the credit notes raised by the Assessee regarding the return of the excess duty paid by the Assessee, there is no dispute in this case of the duty being passed on to any other person by the buyer. As it is clear that the Assessee has borne the burden of duty, it cannot be said that it is not entitled for the refund of the excess duty paid. In view of the facts of this case being different from Civil Appeal No. 7906 of 2002, the appeal preferred by the Revenue is dismissed."

19. In the present case, CA certificate dated 15.06.2015 was submitted to substantiate that burden of duty initially passed on to dealers/ distributors was assumed back by petitioner after credit notes were issued.

20. As to the maintainability of writ petition, Sri Gulati submitted that the Apex Court in **State of Punjab vs. Bhatinda District Cooperative Milk Producers Union (2007) 11 SCC 363** had held that question of limitation being a question of jurisdiction, a writ petition under Article 226 of the

Constitution is maintainable. He also relied upon decision of this Court in case of ***Samsung India Electronics Pvt. Ltd.*** (supra) wherein it has been held that writ petition is maintainable when reassessment proceedings are initiated on the basis of mere change of opinion.

21. It was lastly contended that no burden of excise duty was passed in respect of cash discount and mega discount is concerned to the dealers/ distributors. Perusal of invoices issued by petitioner reveals that in case of cash discount and mega discount, the discounts are passed on to dealers through invoices issued at the time of sale of products, thus, amount paid by dealers to petitioner is the discounted prices and incidence of excise duty on such discount remained with petitioner alone and is never shifted to dealer.

22. Per contra, Sri B.K.Singh Raghuvanshi, learned counsel appearing for the department submitted that order impugned dated 30.11.2017 is appealable before Commissioner (Appeals) in terms of Section 35 of the Act, as there is an alternative remedy available to the petitioner. He has relied upon a decision of the Apex Court in case of ***Union of India vs. Rubber Products Ltd. 2015 (326) ELT 232 (SC)***.

23. He further submitted that excise duty is subsumed in the prices and not charged separately from customer, when price charged from customer includes excise duty and discounts are provided to the dealers by way of credit notes, then it is not clear how the duty element included in the discount granted by way of credit note is passed on to customers after sale.

24. It was also contended that Section 11A of the Act provides for recovery of excise duty refunded erroneously. The show-cause notice was issued in the background of judgment of Apex Court in the case of **Addison and Company** (supra). According to him, there is no pre-condition under Act to review of the refund order before initiating recovery proceedings, as Act nowhere bars such recovery proceedings without review of refund order.

25. Sri Raghuvanshi also relied upon judgment of Apex Court in case of **Jain Shudh Vanaspati** (supra) wherein it has been held that show-cause notice issued under Section 28 of Customs Act, could be issued for demand of duty without revising order passed under Section 47 in terms of Section 130 of Customs Act. Reliance has also been placed upon a decision of Apex Court in case of **CCE Bhuvenshwar vs. Re-Rolling Mills (1997) 94 ELT 8 (SC)** wherein it has been held that Section 11A was parimateria with Section 28 of Customs Act.

26. Learned counsel for department laid stress that show-cause notice as well as the order dated 30.11.2017 are not in nature of reassessment as they do not affect or change the quantum of excise duty assessed and refunded to petitioner, but has been issued only for transfer/ credit to the Consumer Welfare Fund after recovering the same from petitioner to whom it has been erroneously refunded.

27. We have heard counsel for the parties and perused the material on record. Before proceeding to decide the issue in

hand, it would be necessary to have a cursory glance at relevant provisions of Central Excise Act, 1944. Relevant portion of Sections 11A and Sections 11B, 12B, 35E and 35 are extracted hereasunder:-

“Section 11A. Recovery of duties not levied or 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, requiring 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 clause (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.

.....

Explanation 1. — For the purposes of this section and section 11AC,—

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

(b) “relevant date” means,-

(i) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid, and no periodical return as required by the provisions of this Act has been filed, the last date on which such return is required to be filed under this Act and the rules made thereunder;

(ii) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid and the return has been filed, the date on which such return has been filed;

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

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

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

(vi) in the case where only interest is to be recovered, the date of payment of duty to which such interest relates.

Section 11B. Claim for refund of [duty and interest, if any, paid on such duty.-

(1) Any person claiming refund of any [duty of excise and interest, if any, paid on such duty] may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year] [from the relevant date] [[in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of [duty of excise and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that

Act :

Provided further that the limitation of [one year] shall not apply where any [duty and interest, if any, paid on such duty] has been paid under protest.

(2) If, on receipt of any such application, the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] is satisfied that the whole or any part of the [duty of excise and interest, if any, paid on such duty] paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided that the amount of [duty of excise and interest, if any, paid on such duty] as determined by the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

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

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the [Principal Commissioner of Central Excise or Commissioner of Central Excise];

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the [duty of excise and interest, if any, paid on such duty] paid by the manufacturer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;

(e) the [duty of excise and interest, if any, paid on such duty] borne by the buyer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;

(f) the [duty of excise and interest, if any, paid on such duty] borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Section 12B. Presumption that the incidence of duty has been passed on to the buyer. -

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

Section 35. Appeals to [Commissioner (Appeals)]. — (1) *Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a [Principal Commissioner of Central Excise or Commissioner of Central Excise], may appeal to the [Commissioner of Central Excise (Appeals)] [hereafter in this Chapter referred to as the [Commissioner (Appeals)]] [within sixty days] from the date of the communication to him of such decision or order :*

[Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]

[(1A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]

(2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner.

Section 35E. Powers 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 Commissioners 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 Committee of Chief Commissioners of Central Excise

in its order.”

28. Thus, from the reading of provisions of Section 11A(1) of the Act, which provides for recovery of any duty of excise which has not been levied or paid or has been short levied or short paid or erroneously refunded. The recovery of such amount of excise duty can be made under Section 11A(1) irrespective of whether such non-levy or non payment or short levy or short payment or erroneously refund was on the basis of any approval, acceptance or assessment relating to rate of duty or on valuation of excisable goods under any other provisions of this Act or Rules made thereunder.

29. Section 35 of the Act provides for appeals to Commissioner (Appeals), wherein any person aggrieved by any decision or order passed under this Act may appeal within 60 days from the date of communication. Further, Section 35E which confers power on Committee of Chief Commissioner of Central Excise to either call for and examine the records of any proceedings in which a Principal Chief Commissioner of Central Excise or Commissioner of Central Excise as an Adjudicating authority has passed a decision or order under the Act and may direct such Commissioner or any other Commissioner to apply before Appellate Tribunal for decision. While Section 11B of the Act provides for claim for refund of excise duty.

30. As in the present case, provisional assessment was finalised on 24.07.2015, the assessing authority recorded a finding that CA certificate dated 15.06.2015 certifies that no part of duty is recovered from the dealers/ distributors involved

in the discount passed on to the dealers/ distributors, which indicates that assessee had not passed on the incidence of duty paid in proportion to the discount given to dealers/ distributors and, therefore, issue of unjust enrichment is a remote possibility and further, the order observed that duty to the tune of Rs.17,89,42,303/- was passed on to the customers and duty deposited to the tune of Rs.1,03,75,633/- was in excess. Further, an application being made by petitioner was adjudicated by Assistant Commissioner on 05.11.2015 wherein it was held that it was not a case of unjust enrichment and petitioner was entitled for refund. This order was also not challenged by revenue and the same attained finality.

31. Thus, question for consideration before us is, as to whether the revenue can initiate proceedings under Section 11A for recovery of excise duty, once adjudication had been made by department making final provisional assessment and, thereafter, adjudicating application for refund under Section 11B, and no appeal being filed challenging the said adjudication which having attained finality, is barred on the ground of change of opinion or would amount to reassessment when once the revenue did not take recourse to appeal in higher forum.

32. As it is not in dispute that after provisional assessment order, the adjudicating authority passed an order for refund under Section 11B of the Act. Both the orders which were appealable and revisable under Section 35 and 35E were never taken to the higher forum by revenue and they attained finality. It was only after decision of the Apex Court in case of

Addison and Company (supra) that show-cause notice was issued on 17.08.2017, and order was passed on 30.11.2017 directing the petitioner for refund of excise duty to be deposited in Consumer Welfare Fund.

33. A careful reading of Sections 11A, 11B, 35 and 35E would reveal that an application for refund as envisaged under Section 11B is not to be dealt as a ministerial Act or an administrative Act, rather an application has to be made by person claiming refund within a prescribed time and the application is to be accompanied by documents referred to in Sub-section (1) of Section 11B to establish that amount of duty of excise and interest, if any paid on such duty in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty and interest, if any, paid on such duty has not been passed on by him to any other person. It is on the receipt of this application, Assistant Commissioner or Deputy Commissioner of Central Excise, if satisfied may make an order for refund. Thus, it is only after the adjudication of the application that an order of refund of duty and interest is passed.

34. Sub-section (3) of Section 11B which is a non-obstante clause makes it clear that dehors any judgment, decree, order or direction of appellate tribunal or court or any other provision of the Act, no refund shall be made except as provided in Sub-section (2). Thus, the procedure prescribed under Section 11B not only regulates the manner and form in which an application for refund is to be made but also prescribes period of limitation as well as method of adjudication in which refund has to be

made.

35. Thus, Section 11B assumes great significance, as any order of refund of excise duty and interest is made only after the adjudication as envisaged under scheme of Section 11B. In the present case, petitioner-company had made an application for refund which was adjudicated on 05.11.2015 and it was directed to refund excise duty to tune of Rs.1,02,75,633/- which was in excess. This order was never challenged by revenue in appeal and it attained finality.

36. Thus, once the order of adjudication has been validly passed under Section 11B and a refund has been made on 05.11.2015, the next question which crops up for consideration is as to whether Section 11A can be invoked thereafter.

37. As Section 11A(1)(a) uses the word "Central Excise Officer" who is empowered for recovery of any refund, Central Excise Officer is defined in Section 2(b) of the Act to mean Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise or any other officer of Central Excise Department invested by Central Board of Excise and Customs constituted under Central Board of Revenue Act, 1963 with any of powers of a Central Excise Officer under the act. Thus, an order of recovery can be passed under Section 11A by an Assistant Commissioner, as he happens to be a Central Excise Officer in

terms of Clause (a) of sub-section (1) of Section 11A, though an application under sub-section (2) of Section 11B can be made and an order for refund can either be passed by Assistant Commissioner or by Deputy Commissioner. Meaning thereby that a Deputy Commissioner can pass an order for refund under Section 11B (2) and an Assistant Commissioner can invoke proceedings for recovery under Section 11A (1).

38. This could lead to a situation where power of recovery under Section 11A is invoked by a subordinate authority despite the fact that refund application has been adjudicated upon by a superior authority under Section 11B.

39. Through plain reading of Section 35E, it is clear that limited revisional jurisdiction is conferred upon Principal Commissioner and Commissioner of Excise in sub-section (2) of Section 35E, this power is not actually to correct any error directly, but only available for directing the competent authority to take matter to the Commissioner (Appeals). Meaning thereby that it is always open to Principal Commissioner or Commissioner or Central Excise to examine the order passed by adjudicating authority under Section 11B and direct the competent authority to file appeal against order of refund. In the present case, order of refund was never taken to higher forum and it became final.

40. Decisions relied upon by the counsel for the revenue in case of ***Jain Shudh Vanaspati*** (supra) relates to proceedings which were vitiated by fraud. Further, the Apex Court recorded a clear finding that goods were cleared for home consumption

under Section 47 of the Act by playing fraud upon the Department. Therefore, the Court held that fraud vitiates all solemn Acts, while in present case department has not alleged any fraud upon the petitioner-assessee.

41. Further reliance placed by counsel for revenue on the decision of **Addison and Company** (supra), wherein it was held that recovery under Section 11A can be made where excise duty was refunded erroneously, but the Apex Court had also held that where the incidence of duty was not passed on and the assessee had borne burden of duty, thus he was entitled for the refund. Thus, both the cases relied upon by the department are not applicable in the present case, as it is neither a case of fraud, nor where incidence of duty was passed on.

42. Secondly, the argument of alternative remedy under Section 35 is concerned, the said fact is of no rescue to the department as specific case of petitioner is that show-cause notice dated 17.08.2017 was issued after more than two years from finalisation of assessment order dated 24.07.2015, and where there is change of opinion by issuance of show-cause notice, writ petition is maintainable as held in **Shahnaaz Ayurvedics** (supra), **Simplex Concrete Piles** (supra) and **Samsung India Electronics Pvt. Ltd.** (supra).

43. As seen above that Section 35E and 11A operate in different fields and are invoked for different purposes, we are merely concerned in this case with the interplay between Sections 11A and 35E. We are also concerned with what

happened in the form of an adjudication under Section 11B. What happens in a case wherein adjudication takes place under Section 11B and authorities do not take recourse available to them, whether after having allowed adjudication under Section 11B to attain finality, was there any remedy available to department at all under Section 11A to proceed.

44. This question was considered and decided in *Eveready Industries* (supra), wherein the Court held that two valuable rights, one in the form of right of appeal and another in form of order of refund, are now sought to be taken away indirectly by taking recourse to Section 11A. What cannot be done directly cannot be done indirectly also.

45. Thus, the department, once the adjudication has taken place under Section 11B cannot proceed to recover on the basis of “erroneous refund” under Section 11A so as to enable the refund order to be revoked, as the remedy lied under Section 35E for applying to the Appellate Tribunal for determination and not invoking Section 11A.

46. In view of the above, we are of the considered opinion that the issuance of show-cause notice dated 17.08.2017 and, thereafter, order dated 30.11.2017 passed by respondent authority for repayment of refund pursuant to orders under Section 11B are unsustainable and are hereby quashed.

47. The writ petition stands **allowed**.

OrderDate :- 17.12.2019
V.S.Singh