

(1991) 08 KAR CK 0031

In the Karnataka High Court

Case No : Writ Petition No. 2943 of 1987

Gurupriya Tele Auto (P) Ltd.

APPELLANT

Vs

Supdt. of Central Excise

RESPONDENT

Date of Decision : 23-08-1991

Acts Referred:

Central Excise Act, 1944 — Section 11 A, 35, 35 E, 35 E (2)
Central Excise Rules, 1944 — Rule 10, 10A, 11, 173B, 173C

Citation : (1992) 37 ECC 62 : (1993) 44 ECR 391 : (1992) 58 ELT 361 : (1992) ILR (Kar) 605

Hon'ble Judges : N. Venkatachala, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : Shri G. Chander Kumar, for the Appellant; Shri Ashok Harnahalli, CGSC, for the Respondent

Judgement

Shivashankar Bhat, J.—The petitioner is a manufacturer of the goods referred by the petitioner as "Telephone Dial" for telephone apparatus/instrument. The question raised in this Writ Petition involves the interpretation of Section 11A of the Central Excises and Salt Act, 1944 (the Act for short).

2. The petitioner had filed classification list of the goods for approval under Rule 173B of the Central Excise Rules, 1944 (the Rules for short). In the list the petitioner classified the goods in question as falling under Chapter 85 sub-heading 8548 of the Central Excise Tariff Act of India, 1985. The petitioner had filed a series of such lists. The first one is dated 28th February, 1986 (Annexure-A) to be effective from the said date; second list (Annexure-B) was filed to be effective from 1-3-1986; third list (Annexure-C) was filed to be effective from 1-4-1986 and the fourth list (Annexure-D) was filed to be effective from 2-4-1986. In all these lists the goods in question was classified under the sub-heading 8548 as electrical parts of machinery or apparatus not specified or included elsewhere in Chapter 85. The second respondent approved the said lists by making an appropriate endorsement on the relevant lists filed by the petitioner and also by issuing a separate endorsement in that regard, which is

dated 6th October, 1986. According to the petitioner he acted upon this approval and cleared the goods after crediting the excise duty thereon treating the goods under the Tariff Item 85.48. Subsequently, the petitioner received a show cause notice dated 27th January, 1987 asking the petitioner to show cause to the second respondent as to why the goods in question classified hitherto as falling under sub-heading 8548 should not be classified under sub-heading 8517 and consequently why not the differential duty of Rs. 1,52,250/- as detailed should not be recovered from the petitioner in respect of the goods cleared during the period 20th August, 1986 to 22nd December, 1986 and this recovery was sought u/s 11A of the Act. The petitioner has challenged this notice as having been issued without jurisdiction by invoking the writ jurisdiction of this Court.

3. According to Sri Chander Kumar, learned Counsel for the petitioner, the classification lists were approved by the proper officer under Rule 173B of the Rules and thereafter the petitioner has been clearing the goods by crediting the requisite duty thereon and at the end of every month appropriate returns were filed by the petitioner as contemplated by Rule 173G(3) of the Rules and these returns were accepted by the proper officer and appropriate orders had been made in the manner provided by the said Rules read with RT 12 Form. The assessment of the petitioner has been thus completed under Rule 173-I. In these circumstances, it is contended by the petitioner that the approved classification lists cannot be changed or modified by the same officer. The remedy of the revenue, if at all, is to invoke Section 35E of the Act against the earlier approval of the classification list. According to the learned Counsel for the petitioner the purpose of Section 11A is only to recover the short paid duty or to recover the duty which was not levied by mistake etc. But Section 11A does not enable the proper officer who approved the classification list earlier and thereafter made an assessment order under Rule 173-I to reassess the petitioner for which purpose he has to necessarily undo the approval given to the classification list. The basic contention raised by the petitioner is that u/s 11A the proper officer is not competent to withdraw the approval given earlier to classification list and then determine the duty payable by an assessee afresh and then proceed to recover the same.

4. The learned standing Counsel for the Central Government however urged that Section 11A is a provision enacted to safeguard the interest of the revenue and it contemplates a situation wherein an assessee escaped the assessment of proper duty, either by non-levy, non-payment, short levy or short payment of the duty or in case of an erroneous refund of any duty collected from the assessee. In a case where this non-levy, non-payment or short-levy or short-payment or erroneous refund was occasioned by an innocent mistake, the proper officer may proceed to recover the amount in question properly leviable or payable within six months from the relevant date; relevant date is a term defined under sub-section (3) of Section 11A, which indicates that the starting point for the period of six months is either the date on which the monthly return has to be filed by the assessee or the date on which the return is actually filed or the date on which

the duty is payable under the Act or the rules. Similarly, in the case of an erroneous refund, the relevant date is the date of such refund. From this the learned standing Counsel for the Central Government urged that it is clear that Section 11A contemplates the reopening of an assessment is an appropriate case and making an order of reassessment. Proviso to Section 11A(1) was pointed out in support of the contention that the content of the power u/s 11A is to rope in for collection of any duty that has escaped from the net of collection and a larger period of 5 years is given in case such an escapement was caused by the culpable conduct of the assessee.

5. The Act levies the duty of central excise on all excisable goods which are produced or manufactured in India. The normal basis of the levy is to assess the tax on the value of the goods at the time of its removal from the manufacturing place. In other words, on completion of the manufacture and the goods are removed to be put into the stream of outside market the levy is imposed and collected. This would involve a continuous operation of assessing every goods removed from the place of manufacture. Such a process would cause great inconvenience to the manufacturer as well as the revenue. It is in these circumstances, certain Rules have been framed to govern the procedure of removing the manufactured articles from the factory. For the purpose of the levy the goods are classified into different categories under various sub-heads enumerated in the Central Excise Tariff Act. The duty is with reference to the value of the goods. Therefore, it is necessary to know the class of goods to which the particular article produced belong. Similarly, it is necessary to know its price. Once these matters are known the assessment of the tax remains to be the arithmetical calculation of the tax.

6. Under the Rules there are two kinds of removals from the factory. As per Rule 52 the goods could be removed on payment of duty for which purpose a particular procedure is prescribed. An officer of the revenue is attached to the place of manufacture or to the place of removal to assess the duty as and when the goods are removed. There is another kind of removal whereunder the assessee is permitted to remove the goods after crediting the estimated tax in an account maintained for the said purpose and to facilitate this procedure Rule 173B and 173C provide for the approval of the classification list and the price list of the goods. The assessee himself will have to credit the duty estimated on the basis of the approved lists, which however will be properly assessed at the end of the month, for which purpose the assessee has to file a monthly return under Rule 173G(3) and the assessment is made under Rule 173-I. However, under Rule 173B as well as under Rule 173C there are also provisions enabling the assessee to remove the goods under protest in case the proper officer does not approve the list filed by the assessee as such, but modifies the same. From these Rules it is clear that the provisions governing the approval of the two lists under Rule 173B and Rule 173C are to facilitate the making of the assessment order and the approval is only a step in the process for making the assessment order ultimately. As per Rule 173B(2), before the approval of the list the proper officer

shall hold an appropriate enquiry. This Rule governs the classification of the goods. The contention of the assessee in the instant case before us is that this enquiry and the consequential approval is a quasi-judicial function and the approval is a decision which is independent of the ultimate assessment order. As in every fiscal legislation imposing tax the Act provides for appeals and further appeals to resolve the dispute under the Act. u/s 35 an appeal lies to the Collector (Appeals), which can be invoked by any person aggrieved by any decision or order passed under the Act. Section 35E empowers the Board to call for and examine the record of any proceeding in which a Collector of Central Excise has made any order as an adjudicating authority and the purpose is to satisfy itself as to the legality or propriety of any decision or order of the Collector. But, the Board by itself cannot revise the order of the Collector. It has to direct the Collector to apply to the Appellate Tribunal for the determination of the points. Similarly, if the decision or order is of any adjudicating authority subordinate to the Collector, the Collector may call for and examine the record and if he is satisfied that the decision or order is not legal or improper, he may direct such subordinate authority to apply to the Collector (Appeals) for the determination of the points arising out of the decision. According to Mr. Chander Kumar these are the provisions which should be invoked by the revenue in case the classification approved by the proper officer under Rule 173B(2) was illegal or improper. When such a specific provision is provided, the learned Counsel contends, that no other provision would be available. According to the learned Counsel there cannot be two parallel remedies available to the Department to have the illegality or incorrectness set aside; when Section 35E(2) is available to that extent Section 11A should be interpreted as not covering the same subject.

7. Section 11A to the extent relevant herein reads thus :

"Section 11A : Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded :

(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, 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".

(The remaining part omitted here.)

8. As already noted the contention of the petitioner herein is that this Section only enables the recovery of duties under circumstances stated therein, but does not empower any officer to adjudicate afresh and thus change the classification approved under Rule 173B.

9. A literal reading of Section 11A shows that whenever a duty of excise has not been levied or whenever any duty of excise has not been paid or whenever the duty has been short-levied or whenever the duty was short-paid or whenever the duty paid was erroneously refunded, an appropriate notice may be served on the person chargeable with the duty etc. and then proceed to recover the amount due to the revenue within six months from the relevant date. The proviso has enlarged the period of limitation to take action. To understand the content of Section 11A, the entire Section will have to be read. The proviso to sub-section (1) throws ample light on the amplitude of this provision. If an assessee acts in such a way and escapes assessment, due to fraud, collusion or any wilful misstatement or suppression of facts etc., he may be proceeded with for the recovery of the duty within five years from the due date. Suppose an assessee by virtue of any fraud, collusion or wilful misstatement gets an approval under Rule 173B for the list filed by him, which results in non-livability of duty on the goods and Section 11A is not attracted to such a situation, the only other remedy available to the revenue is Section 35E. The period of limitation to invoke Section 35E is two years from the date of the decision or order to be challenged. It looks strange that a smaller period of limitation is provided to enable the revenue to set at naught an order obtained by an assessee by fraud or collusion, while under another set of circumstances a larger period of five years is provided under proviso to Section 11A. This apart, if fraud, collusion, etc. was discovered after two years of the approval, Section 35E(2) will not be available at all. Though the learned Counsel for the petitioner contends that in such a case where the approval was the result of fraud, collusion, etc., the approval given cannot be considered as an approval in the eye of law, even then the reasoning does not take him further because a similar argument can be advanced in the case of an approval granted by mistake, that is to say, where there was mutual mistake on the part of the assessee as well as the proper officer. We are of the view that Section 11A is comparable in its purpose with similar provisions found in sales tax and income tax legislations, wherein the assessing authority is given the power to initiate proceedings to net in a subject which has escaped assessment. For example u/s 147 of the Income Tax Act, prior to its substitution by the Direct Tax Laws (Amendment) Act, 1987 (with effect from 1-4-1989), had two clauses (a) and (b). As per clause (b), if, notwithstanding that there has been no omission or failure on the part of the assessee to disclose all material facts and assessee had filed a proper return, still, the Assessing Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, the said Officer may reassess such escaped income. The nature of the information referred here is now clarified by the Supreme Court in *M/s. A. L. A. Firm v. Commissioner of Income Tax* (AIR

1991 S.C.W. 849). Among other things, this information may come out of the existing material on record pertaining to the assessment made already. The source of information need not be external to the record of the earlier assessment proceedings. Even if the assessee acted bona fide and in no way his conduct is blame worthy, the Assessing Officer may resort to Section 147(b) if the conditions stated therein are satisfied. Prima facie this may look like a power of review, reviewing the earlier assessment order when the material on record is the same throughout; but, the fact is, such a provision is found in the Income Tax Act. Such a power to assess the escaped subject from the net of taxation is essential to safeguard the interest of the revenue.

The above situation under the Income Tax Act may be further considered with reference to Section 263 of the Income Tax Act, whereunder the Commissioner of Income Tax is given the power to revise an order of the Assessing Officer, if he finds the said order is erroneous and is prejudicial to the interest of the revenue; here, the power of the Commissioner is confined to examine the record of any proceedings culminating in the order sought to be revised. If the Commissioner, on examination of the record opines that an order of assessment is erroneous and prejudicial to the interest of the revenue, he may resort to this power and interfere with the order of assessment. This power to some extent covers a part of the power available to the Assessing Officer under the aforesaid Section 147(b) of the Income Tax Act. Thus, it is possible that in a fiscal legislation, certain powers may fall within more than one kind of jurisdiction. The essence of the matter is, whether the legislature while enacting the law has created such a power and whether in respect of the same subject two different authorities could exercise their powers under a given set of circumstances.

Therefore, there is nothing a strange if the purpose sought to be achieved by Section 11A of the Act also could be realised by resort to any other provision of the Act. To some extent the power to realise the duty which has escaped assessment by an erroneous order of assessment, may be available both u/s 11A(1) and Section 35E.

10. Mr. Chander Kumar's contention that Section 11A is to be confined to the "recovery of the tax" alone and not to any kind of adjudication or proceedings to determine the actual duty payable, would defeat the very provision. Section 11A provides for an enquiry, because, before proceeding to recover the duty u/s 11A show cause notice has to be issued to the assessee and he has to be heard in the matter.

11. The Supreme Court held in Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., :

"It is true that Rule 10A seems to deal only with collection and not with the ascertainment of any deficiency in duty or its cause by a quasi-judicial procedure. If, however, it is read in conjunction with Section 4 of the Act, we think that a quasi-judicial proceeding, in the circumstances of such a case, could

take place under an implied power. It is well established rule of construction that a power to do something essential for the proper and effectual performance of the work which the statute has in contemplation may be implied".

12. Section 11A of the Act substantially reflects the earlier Rules 10 and 10A of the Rules. Scope of those Rules came up for consideration before the Supreme Court in the above referred National Tobacco Company's case. The assessee therein was removing the goods after making appropriate debit entries in the "account-current" towards the duty payable on the said goods. The adjustments in the account were being effected by the assessee without any order by the proper officer. The revenue issued notice proposing to complete the assessment. The assessee contended that there was no power either under Rule 10 or Rule 10A to make an order of assessment and alternatively contended that the proceedings initiated were beyond the period prescribed by Rule 10. The notice envisaged collection of duty left payable by the assessee, in view of the earlier under valuation of the goods by the assessee in the assessee's price list. The revenue contended that the case attracted Rule 10A in which there was no period of limitation to take action to recover the duty. Revenue's contention was accepted by the Supreme Court. In the course of its judgment, Supreme Court observed at page 2571, that :

"Rule 10 presupposes an assessment which could be reopened on specified grounds only within the period given there".

In other words, Supreme Court clearly indicated that Rule 10 provided a power to reopen an earlier assessment on grounds specified in the said Rule. As to the meaning of the term "levy" under Rule 10, Supreme Court held that it was not "used in the Act or the Rules as meaning actual collection". It was a term wider in its import than the term "assessment" and it may include both "imposition" of a tax as well as assessment. It was further observed that :

"The term "assessment" is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount".

Thus, any process which is necessary and incidental to the determination of the amount of tax has to be understood as part of the procedure of assessment. This supports our view that the approval of the list under Rule 173B is a stage in the process of assessment and is not only necessary but also incidental to the making of the order of assessment under Rule 173-I.

13. In para 21 (at p. 2571) Supreme Court pointed out :

"Moreover, it is the process of assessment that really determines whether the levy is short or complete".

Therefore, when Section 11A empowers the revenue to recover the short levy of duty, etc. it should naturally empower it to determine as to whether there was a

short levy, which could be done only by a process of assessment.

Again, at page 2572 the Supreme Court observed :

"We think that Rule 10 should be confined to cases where the demand is being made for a short levy caused wholly by one of the reasons given in that rule so that an assessment has to be reopened".

Ultimately, having regard to the facts of the said case Rule 10A was held as governing the fact situation. At one stage of its discussion, at para 29, Supreme Court indicated that the subject of recovery of short levy fell both under Rule 10 and Rule 10A, but it was necessary to demarcate their spheres of operation so that Rule 10A would not become useless.

We have referred to this decision of the Supreme Court at length, since the present Section 11A substantially covers the field occupied earlier by the aforesaid Rules 10 and 10A. The two principles which are relevant to answer the question raised before us, are deducible from this decision of the Supreme Court in National Tobacco Company's case :-

(1) Under Rule 10 and 10A power to reopen assessment is implicit.

(2) Any procedure adopted in fixing the liability to the tax and its quantification, is part of the process of "assessment".

By the application of the said principles, it has to be held that Section 11A of the Act empowers the reopening of an assessment and this power to reopen an assessment would necessarily include reopening of any other matter which is essential to the making of an order of assessment. Since approval of the list under Rule 173B is a step necessary for leading to the making of an order of assessment, this approval could be a subject of modification, while reopening the assessment u/s 11A.

Above conclusion of ours is sufficient to negative all the contentions raised by the petitioner. However, it is necessary to refer to a few decisions cited at the bar.

14. In N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., , the AR 1 Form filed by the assessee had been accepted and assessment order had been made. There was no suppression of any relevant material by the assessee. Later, the authorities entertained some doubt about the description of the goods and hence issued notice demanding differential duty, along with a show cause notice. The notices were issued beyond the period provided by Rule 10. Supreme Court held that the subject of the notices was covered by Rule 10 and hence the limitation prescribed thereunder operated as a bar to the proceedings in question. As to the applicability of Rule 10, it was observed at page 2047 :

"Similarly even in cases where there has been a nil assessment due to one or other of the circumstances mentioned in Rule 10 and if subsequently it is found that duty is payable, then the entire amount of duty should be considered to

have been short-levied."

15. In *D.R. Kohli and Others Vs. Atul Products Ltd.*, , Rule 10A was applied to uphold the action taken to collect the short levy and in that connection the various circumstances under which Rule 10 could be applied were stated at para 17. Since there was no earlier assessment at all, Supreme Court held that Rule 10A was attracted, whereunder, appropriate assessment order could be made before demanding the short-levy of the duty.

16. *Jaishri Engineering Co. (P) Ltd., Vs. Collector Of Central Excise, Bombay*, illustrates that the content of the power u/s 11A includes a power to charge the tariff item applicable to the goods in question and if a wrong classification had been made earlier due to the misstatement, fraud, etc. on the part of assessee, the revenue can invoke the proviso to Section 11A(1). The facts of the case disclose that the assessee had obtained approval to the classification list filed by it earlier. In spite of such approval, Section 11A was held as applicable to the case. In view of the misconduct of the assessee there, the larger period of limitation was applied under the proviso. The case conclusively establishes that Section 11A vests a larger power in the authorities than the one stated by the petitioner in the instant case and that while exercising the power u/s 11A, the authorities under the Act are not bound by the approval given to the classification list earlier.

17. In *Tata Iron and Steel Co. Ltd. Vs. Union of India (UOI) and Others*, question of classification came up for consideration. The assessee had classified the goods under Tariff Item 26AA(ia) and this list had been approved earlier. Subsequently a show cause notice was issued to the assessee to show cause inter alia, as to why the assessee should not be proceeded against, for contravention of Rule 173B(9) etc. In respect of goods referred generally as composite units, the assessee admitted before the Supreme Court that duty was payable under both the Tariff items, (including Item 68) but raised the plea of limitation. This plea was upheld and Supreme Court applied the six months rule u/s 11A in this regard, as there was no suppression of any fact by the assessee earlier.

18. *Collector of Central Excise, Hyderabad Vs. Chemphar Drugs and Liniments, Hyderabad*, was concerned with the classification list and availing of the exemption under a particular Notification. This was found to be erroneous. But the assessee's conduct was not in any manner blame worthy. Hence, the recovery of the duty for a period of six months prior to the date of the notice was upheld u/s 11A after rejecting the revenue's contention that the larger period under the proviso was available to the revenue.

19. In AIR 1989 617 (SC) , the contention that the revenue cannot change the classification list, having approved it earlier was negated. At page 619, the Supreme Court observed :

"The next submission on behalf of the appellant is that the Classification Lists had been approved earlier and the Excise authority was estopped from taking a

different view. Plainly there can be no estoppel against the law. The claim raised before us is a claim based on the legal effect of a provision of law and, therefore, this contention must be rejected".

20. Similar view was stated in *Plasmac Machine Manufacturing Co. Pvt. Ltd. Vs. Collector of Central Excise, Bombay*, and the reopening of the approved classification list was upheld by the Supreme Court.

21. The Calcutta High Court in its decision reported in *I.T.C. Ltd. and Another Vs. Union of India (UOI) and Others*, dealt with a similar question and upheld the show cause notice issued to set at naught the approved list and the proposal to recover the differential duty. At page 491, the learned Judge observed :

"On behalf of the Revenue it was submitted that provisions of Section 11A and those of Sections 35A and 35EE are independent provisions and could only be exercised by the original, Appellate and Revision Authorities respectively and it was contended that from the provisions of Sections 35A and 35EE, it was made abundantly clear that Section 35A and Section 35EE did not incorporate the entire provision of Section 11A but only it was provided those powers which could not be exercised by the Appellate and/or Revision Authorities beyond the period of limitation mentioned in Section 11A of the said Act. This according to the learned counsel on behalf of the Revenue, made it abundantly clear that Section 11A is not intended to be used as a mere machinery provision but an independent provision and the powers conferred therein are independent from the powers conferred in other provisions of the Act. If it was an intention of the legislature that Section 11A is a machinery provision which could be exercised only in aid of the power conferred u/s 35A or Section 35EE, in that event, the legislature should not have incorporated only the period of limitation in the said two sections from Section 11A. By this it is made abundantly clear that the Section 35A and/or Section 35EE was quite independent of Section 11A, otherwise language used in Section 11A would become meaningless and the legislative intention will be fully defeated."

22. In 22 ELR 770 (*Duncan Agro Industries Ltd. v. Central Board of Excise and Customs*) Calcutta High Court observed, on this question, while dealing with a matter u/s 11B of the Act, thus

"Rule 10 as it stood prior to its amendment on 6th August, 1977, empowered the Assistant Collector of Central Excise to determine, inter alia, whether duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an officer. Under the amended Rule 10 it is the Assistant Collector who has been empowered to recover the duties not levied or not paid or short levied or not paid in full or erroneously refunded. If the successor officer cannot grant the refund, then the successor officer cannot also invoke the provisions for recovery of duty short-levied or not levied. Such construction would reduce the provisions of Rule 10 and Rule 11 of the said Rules to futility".

23. Mr. Chander Kumar read the report of the Excise Law Times under the Chapter "Tit-Bits" cited as 1990 (47) ELT 109, wherein it is stated that the Supreme Court affirmed the view expressed by the Appellate Tribunal that an approved classification list cannot be reopened especially when there is no change in the pattern of manufacture. The decision of the Appellate Tribunal is found in 1987 (30) ELT 442 In the said case the classification list has been approved and thereafter a show cause notice was issued as to why the classification should not be altered. The facts do not disclose that any action was taken u/s 11A to collect the duty which was short-levied, etc. as stated in Section 11A. In fact the demand for the period beyond the period stated in Section 11A was held to be time-barred.

24. The learned Counsel referred to another similar report found in 1990 (48) ELT 63, wherein it is stated that the Supreme Court affirmed the order of the Appellate Tribunal holding that the Assistant Collector cannot review his own order and the proper course was a revision by the Collector. The said report has nothing to do with the facts of the present case. However, the Supreme Court seems to have observed that the said decision was "without expressing any opinion on the scope of the jurisdiction u/s 11A of the Act" and the entire decision was in the facts and circumstances of the said case.

25. The decision of the Delhi High Court in Ajanta Iron and Steel Company Pvt. Limited Vs. Union of India and others, is again a case arising out of an action taken to review the approved classification list.

26. Mr. Chander Kumar also brought to our notice a decision of a Division Bench of this Court in M/s. Sri Krishnarajendra Mills Ltd. v. Assistant Collector of Central Excise & Another (W.P. No. 12137 of 1983 dated 22-10-1990) reported in Sri Krishnarajendra Mills Ltd. Vs. Assistant Collector of C. Ex., . The concessional duty levied on the assessee was sought to be reopened by a show cause notice on the ground that the goods in question did not fall within the Notification granting the concessional rate. The notice issued sought an explanation from the assessee as to why the approved classification lists should not be revised. The Bench observed that there was no provision to review an approval granted under Rule 173B and a power to recall or review must be expressly conferred on the authority. The aforesaid decision was not concerned with Section 11A of the Act at all, as we do not find any reference either to the said provision or to the earlier Rules 10 and 10A in the manner it has been discussed by us already.

27. In W.A. No. 2211/85, decided on 5th December, 1990 Shyam Sunder U. Nichani Vs. Asstt. Collector of C. Ex. and Customs, another Bench of this Court upheld the action taken to recover the duty short-levied by virtue of the approved classification list along with an endorsement that the assessee was entitled to the benefit of certain exemptions. At paragraph 10 Justice B. P. Singh speaking for the Bench observed :

"On the other hand, the case of the respondents is that by reason of the mistake

on the part of the respondents the classification list was approved and the appellant was given benefit of total exemption from payment of excise duty. This amounted to a "short levy" of excise duty and therefore the provisions of Section 11A of the Act were applicable for recovery of such excise duty, which was short levied. In view of the decisions of the Supreme Court on this question, the contention of the respondents must be accepted".

Though at another part of the judgment there is an observation that the scope of Section 11A was not to be considered in the said case and that normally power of review will have to be specifically conferred on an authority, the said decision in no way runs counter to the conclusion we have arrived at.

28. Power of review should be specifically conferred, but the process of reopening an earlier assessment to assess the escaped subject of taxation necessarily involves and implies a power to review the earlier order. An implied power has been read into Rule 10A by the Supreme Court, whereby the process of assessment can be resorted to enable the recovery of duty thereunder and there is no warrant to deny a similar power to the revenue u/s 11A of the Act. The undoing of the approved classification list may be necessary to exercise the power u/s 11A effectively having regard to the scheme of the Act and the Rules framed thereunder. Approval of the list by the proper officer in no way operates as estoppel, if the circumstances stated in Section 11A are attracted. The Rules regulating the approval of the lists and the making of the assessment order under Rule 173-I are to be read together not only as part of one system, but as a step in the process of making the assessment order.

29. Therefore, we find no merit in the petitioner's contentions. However, the petitioner is given a further four weeks" time from today to show cause in response to the impugned notice; subject to this, the Writ Petition is dismissed. Rule discharged. No order as to costs.