

(1992) 11 MAD CK 0032
In the Madras High Court
Case No : Writ petition No. 567 of 1984

Sivananda Pipe Fittings Limited	Vs	APPELLANT
Superintendent of Central Excise and Others		RESPONDENT

Date of Decision : 17-11-1992

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11B, 35A, 35B, 40
Constitution of India, 1950 — Article 14, 19
Tamil Nadu General Sales Tax Act, 1959 — Section 16, 32, 34, 35E

Citation : (1994) 45 ECC 77 : (1994) ECR 146

Hon'ble Judges : Raju, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Raju, J.—The above writ petition has been filed for the issue of a writ of certiorari to call for and quash the proceedings of the third

respondent in A.No. 79/83 (CBE) (D), dated 27.12.1983.

2. The petitioners are manufacturers of straight length pipes (bevelled at ends), water well casing pipes, pipe bends, rolled and welded pipe work,

boiler tubes, etc., and were assessed on the file of the Superintendent of Central Excise, Hosur. It is claimed that under a mistake of law, excise

duty was paid on those goods under tariff item (T.I.) 68 of the Central Excise Tariff. The petitioners also claimed that they buy the duty-paid pipes

and merely bend or process the pipes and coming to know of the orders of the Central Board of Excise and Customs, New Delhi dated

28.2.1981 issued in the matter of M/s. Stewards and Lloyd's of India Limited, Calcutta, the petitioners sought for reclassification of their products

under T.I. 26AA (IV) of the Central Excise Tariff. On an application submitted on

22.8.1983, it is claimed that revised classification was approved by the first respondent. Thereupon, the petitioners filed an application on 26.8.1983 claiming refund of a sum of Rs. 6,19,444.65 after adjusting a sum of Rs. 44,732.03 on exports, which according to the petitioners was erroneously paid for the period from 12.5.1981 to 28.8.1983.

3. The second respondent, before whom the said application for refund was filed, issued a notice dated 19.9.1983 proposing to reject the claim as time barred u/s 11-B(1) of the Central Excises and Salt Act, 1944 and the petitioners submitted their objections on 30.9.1983 contending that the commodity manufactured by them was not excisable since the -pipes had already suffered duty and not only there cannot be any fresh duty, but the duty paid was under a total mistake and consequently, no period of limitation will apply to make their claim. The petitioners claim to have placed reliance upon the decision in D. Cawasji & Co. and Ors. v. State of Mysore and Anr. 1975 ELT J 154 and other decisions in support of their stand. The second respondent by his proceedings dated 12.10.1983 ordered the refund of Rs. 3,01,915.73 in full settlement of the claim made by the petitioners on 26.8.1983.

4. While matters stood thus, the petitioners received a"" notice from the third respondent that an appeal had been filed against the refund granted by the second respondent by the Assistant Collector of Central Excise (Audit), Coimbatore as per the authorisation letter from the Collector of Central Excise, Coimbatore. The petitioners submitted their objections to the appeal as required by the third respondent, contending that the second respondent had granted refund applying the ratio of the decision" of the Supreme Court in Patel India Private Limited v. Union of India 83 ELT 1495 and that the department had not challenged the revised classification list approved by the second respondent and since the duty was paid under a mistake of law, the proceedings now instituted are not maintainable at the instance of the Collector of Central Excise, Coimbatore.

The third respondent also called for Memo of Cross Objections by his notice dated 17.11.1983 to be submitted within 30 days. Thereupon, under the impugned order dated 27.12.1983, the third respondent set aside the communication of the third respondent dated 12.10.1983 and further directed that the petitioners should re-credit the amount within 7 days from the

receipt of the said order made an appeal. The third respondent has exercised powers u/s 11-B and particularly placed reliance on Section 11-B(%) of the Act. Hence, the above writ petition.

5. In the affidavit filed in support of the above writ petition, it is contended that u/s 35-E of the Act, the Collector of Central Excise has to direct

the very adjudicating authority whose decision or order calls for determination, to apply to the Collector (Appeals) and does not empower any

other authority to file an appeal and consequently, the appeal filed by the different authority than the adjudicating authority is non est. It is also

contended that the application can be only to seek a reference and cannot be treated as an outright revision/appeal to set aside an order of the

adjudicating authority and the third respondent has only power to decide the issue and remit the matter with his opinion to the adjudicating authority

to pass consequential orders and cannot by himself set aside the order. It is also contended in the said affidavit that the appellate authority

exercising powers u/s 35-A of the Act can merely decide an issue and refer a case to the adjudicating authority and thereafter the procedure

contemplated u/s 11-A of the Act has to be followed. Before calling for repayment or duty allegedly short-levied or erroneously refunded and the

absence of service of any such show-cause notice by any of the respondents vitiates the impugned order. It is the further contention of the

petitioners that the amount was originally paid and collected under a mistake which was common to the petitioners as well as the department, that

when the error was pointed out, the goods were reclassified by an order dated 24.8.1983 for future clearances and the inevitable consequence of

the approval of the reclassification was that the goods were never taxable under T.I. 68 of the Central Excise Tariff and since the other assessees

similarly situated had not remitted duty during the period between 12.5.1981 and 28.8.1983, the collection from the petitioners alone is

discriminatory and violative of Article 14 of the Constitution of India and consequently, the bar of limitation stipulated u/s 11-B(1) of the Act and

the bar of jurisdiction stipulated in Section 11-B(1) and (5) cannot be put against the petitioners.

6. The respondents have filed a counter affidavit contending that the petitioners are manufacturers of elbows, reducers, tees which are pipe fittings

in their factory at Hosur, that on the basis of the classification list submitted by the petitioners those goods were classified under tariff item 68 and

accordingly, the petitioners were paying duty and that when subsequently the petitioners sought for reclassification of their products under tariff

item 26 AA (iv) by filing a revised classification list on 22.8.1983, the claim was considered and accepted by the Assistant Collector, Central

Excise, Hosur. While accepting the position that thereafter the petitioners filed a refund claim for the period between 12.5.1981 to 26.8.1983, it is

contended that there was no protest or objection from the petitioners for classification of their products under T.I. 68 till 22.8.1983 when the

revised classification list was filed, and that, therefore, any claim for refund of any duty of excise has to be considered in the context of the

provisions contained u/s 11-B of the Central Excises and Salt Act, 1944. Consequently, it is also contended that the refund claim should have been

made within a period of six months from the relevant date, namely, the date of payment of duty and inasmuch as the refund claim was received by

the second respondent only on 26.8.1983 a portion of the claim pertaining to the period from 12.5.1981 to 16.2.1983 was found to be

inadmissible in view of the bar of limitation prescribed u/s 11-B of the Act and it is only on that account, a sum of Rs. 3,17,528.92 pertaining to the

period from 27.2.1983 to 26.8.1983 alone was sanctioned for refund to the petitioners and so far as the claim for the period prior to 26.2.1983 is

concerned, a notice was issued to the petitioners to show cause against why the claim for refund for the period prior to 26.2.1983 should not be

rejected as hit by the bar of limitation contained in Section 11-B of the Act.

7. The respondents also state that the Collector of Central Excise, who examined the records relevant to the refund claim exercised his powers u/s

35-E of the Act by issuing a direction to the Assistant Collector of Central Excise to file an appeal before the Collector of Central Excise

(Appeals) u/s 35-E of the Act and the Appellate Collector, after inviting cross objections from the petitioners, by forwarding a copy of the appeal,

came to the conclusion that the Assistant Collector of Central Excise had no powers to overlook the mandatory provisions of Section 11-B of the

Act and consequently, the refund for the period from 12.5.1981 to 26.2.1983 was hit by the bar of limitation u/s 11-B of the Act. Admittedly, the

Appellate Collector directed the petitioners to recredit the amount refunded erroneously to them. It is also stated that the petitioners had an

effective alternative remedy by filing an appeal before the Tribunal (CEGAT) and, therefore, the writ petition is not maintainable.

8. While traversing the various pleas raised in the affidavit to challenge the impugned order, the respondents contend that the Adjudicating

Authority or the Authorised Officer can make the application to the Appellate Tribunal or the Collector (Appeals), that the plea based on the

absence of notice is misconceived, that the procedure prescribed u/s 35-E of the Act has been directly complied with in forwarding a copy of the

appeal filed and also by inviting cross objections from the petitioners and giving a personal hearing before passing final orders by the Appellate

Collector and that no further show-cause notice is contemplated u/s 35-E of the Act. The respondents also contend that there is vast and

substantial difference between the procedure to be followed in disposing of an appeal filed u/s 35-A of the Act and the exercise of powers u/s 35-

E of the Act. It is also contended that the forwarding of the copy of the appeal and the opportunity given to file a cross objection constitute

sufficient compliance with law and there was no need for any further show-cause notice to be issued and that the plea of the petitioners to the

contra would run counter to the stipulations contained in Section 35-E of the Act. The respondents also deny the claim of the petitioners that the

Collector of Central Excise (Appeals) exercising powers u/s 35-E of the Act can only decide and remand back to the original authority and cannot

set aside the order and there is no such restriction warranted in the provisions contained in Section 35-E either expressly or by implication. While

contending that the only issue for determination is whether the time barred refund is justifiable or not, the respondents contend that once the

Appellate Collector came to the conclusion that the claim for refund was time barred and refund was erroneously made, the appellate Collector

was well within his jurisdiction for ordering recovery from the petitioners. The decision in Patel India Private Limited v. Union of India 83 ELT

1495 (supra) is said to be not applicable since according to the respondents, they were rendered under the provisions with a different scheme

underlying them, and that the specific mandate contained in Section 11-B of the Act militates against the applicability of the decision of the Apex

Court to the case on hand. It is also contended that any claim arising out of a reclassification could be considered only in the context of Section 11-

B of the Act and the mandatory requirements of the law as enshrined therein cannot be overlooked. It is also contended that the specific stipulation

of a period of limitation u/s 11-B(5) of the Act was with a view to prevent unjust enrichment in cases where the parties have collected the money

from their consumers as duty of excise either intentionally or by mistake of law and subsequently claim them also from the department irrespective

of any time limit and consequently there was nothing unconstitutional about the impugned orders passed by the Appellate Collector.

9. Mr. C. Natarajan, learned Counsel for the petitioners contended as follows:- That having regard to the provisions contained in Section 11-A

and the proviso to the said Section conferring power upon the Assistant Collector within 6 months and the Collector under certain circumstances

within a period of five years there is no scope for having recourse to Section 35-E of the Act for the recovery of the duty erroneously refunded. It

is also contended that even when a direction u/s 35-E(2) is issued, the Collector of Appeals can, in the appeal filed, only determine about the

legality of the order passed u/s 11-B, and there is no power in the Collector of Appeals to issue a positive direction for repayment or recovery of

the duty erroneously refunded earlier, de hors Section 11-A of the Act. The further submission of the learned Counsel for the petitioner is that even

assuming that the Collector of Appeals, while disposing of the appeal u/s 35-E could have passed orders u/s 35-A(3) for the recovery of the duty

erroneously refunded; the same could not have been done without complying with the requirements of the proviso by issuing a show-cause notice

and also complying with Section 11-A of the Act. In substance, the plea of the learned Counsel for the petitioner is that recovery of any duty

erroneously refunded u/s 11-B could be made only u/s 11-A and even while exercising the powers of revision or appeal, there could not be any

positive order for recovery without meticulously complying with the stipulations contained in Section 11-A of the Act. The entire stand of the

petitioner is built upon the supremacy of Section 11-A of the Act and that even Section 35-E of the Act is subject to Section 11-A of the Act and

without conforming to the stipulations and conditions contained in Section 11-A, no positive order for recovery of the duty erroneously refunded

could be passed under any provisions of the Act and particularly Section 35-E. The decisions referred to by the learned Counsel in support of his stand will be considered, at the appropriate stage.

10. Mr. P. Narasimhan, learned Counsel appearing for the respondents contended that in view of the direction by the Collector to file an appeal to the Collector of Appeals, and the issue of notice of appeal with a direction to file cross objections, if any, to the demand made by the department, there is no need to again have recourse to or comply with the stipulations contained in Section 11-A of the Act. It is also the contention of the learned Counsel for the department that the powers u/s 11-A and the appellate as well as revisional powers conferred under the other provisions like Sections 35-A, 35-E, etc., are distinct and separate, each of them with well defined and settled norms and distinctions and subject to the conditions specified in the respective provisions and the provisions contained in Section 11-A cannot be dovetailed into the other provisions or that the exercise of power under other provisions by the Appellate and Revisional Authorities cannot be subjected to or made dependent upon compliance with the criteria or restrictions u/s 11-A of the Act. Finally, the learned Counsel contended that while setting aside the order u/s 11-B, the competent authority entrusted with such power has as a necessary corollary to inevitably also pass orders for the return or repayment or recovery of the duty erroneously refunded. In effect, it was contended that accepting the plea of the petitioner would amount to allowing the provisions of Section 35-E to become otiose and render completely nugatory leading to absurd results.

11. The relevant provisions of the Act which require to be noticed are as follows:-

Section 11-A. (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central

Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid

or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not

pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of

fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made

thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the

words, "six months", the words "five years" were substituted.

Explanation: Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid

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

Section 35-A. Procedure in appeal: (1) The Collector (Appeals) shall give an opportunity to the appellant to be heard, if he so desires.

(2) The Collector (Appeals) may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of

appeal, if the Collector (Appeals) is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

(3) The Collector (Appeals) may, after making such further inquiry as may be necessary, pass such order as he thinks fit confirming, modifying or

annulling the decision or order appealed against, or may refer the case back to the adjudicating authority with such directions as he may think fit for

a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund

shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:

Provided further that where the Collector (Appeals) is of opinion that any duty of excise has not been levied or paid or has been short-levied or

short-paid or erroneously refunded, no order requiring the appellant to pay any duty not levied or paid, short-levied or short-paid or erroneously

refunded shall be passed unless the appellant is given notice within the time-limit specified in Section 11-A to show cause against the proposed

order.

(4) The order of the Collector (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon

and the reason for the decision.

(5) On the disposal of the appeal, the Collector (Appeals) shall communicate the

order passed by him to the appellant, the adjudicating authority and the Collector of Central Excise.

Section 35-E. Powers of Board or Collector of Central Excise to pass certain orders:- (1) The Board may, of its own motion, call for and examine

the record of any proceeding in which a Collector 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 Collector 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.

(2) The Collector 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 to apply to the Collector (Appeals) for the determination of such points arising out of the

decision or order as may be specified by the Collector of Central Excise in his order.

(3) No order shall be made under Sub-section (1) or Sub-section (2) after the expiry of one year, from the date of the decision or order of the

adjudicating authority.

(4) Where in pursuance of an order under Sub-section (1) or Sub-section (2) the adjudicating authority or the authorised officer makes an

application to the Appellate Tribunal or the Collector (Appeals) within a period of three months from the date of communication of the order under

Sub-section (1) or Sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Collector

(Appeals), as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the

provisions of this Act regarding appeals including the provisions of Sub-section (4) of Section 35-B shall, so far as may be, apply to such

application.

12. Before adjudicating upon the issues raised, it would be useful to refer to the various judicial pronouncements and the opinion of the Tribunals,

pressed into service by the counsel appearing on either side to substantiate their

respective stands. The decision of a Division Bench of the Calcutta High Court reported in *S. Venkatesan and Another Vs. Nihalchand Agarwala and Others*, was the one rendered construing the relative scope of Sections 39 and 190-A of the [Sea] Customs Act, 1878. While considering the case of a claim by the Customs Officer for payment of duty erroneously refunded by the department, the Division Bench of the Calcutta High Court held it was required to be taken u/s 39 of the said Act within three months from the relevant date and that the period of limitation prescribed u/s 190-A cannot override the express provision in Section 39 which limits the issue of notice of demand for payment of duties not levied or short levied or erroneously refunded to a period of three months.

To come to such a conclusion, the learned Judges considered that there was really no conflict between Sections 39 and 190-A, that whereas Chapter V comprising Section 39 deals with rights and liabilities, Chapter XVII in which Section 190-A occurs contains procedural provisions, that where a general intention as well as a particular intention has been expressed in the Act and both are incompatible with each other, the particular intention is to be considered as an exception to the general one and consequently, the period of limitation prescribed u/s 39 must prevail and cannot, therefore, be destroyed or overridden by Section 190-A and the limitation stipulated therein.

13. A Division Bench of the Delhi High Court, in a decision reported in 1981 ELT 114 (Delhi) (*Bawa Potteries, Mehrauli v. Union of India and Anr.*) construed the scope of Rule 10 and Rule 173-J of the Central Excise Rules and held that as there could be no non-levy or short-levy except by a process of assessment and likewise a refund could have been directed only after making a like determination of quasi-judicial nature and not only Rule 10 applied to such a case but Rule 173-J also applies to the review of a case of erroneous refund under Rule 10 and in substance, it only directs the application of Rule 10 in certain cases with a modification regarding the period of limitation. In 1985 ECR 2366 the South Regional Bench of the CEGAT at Madras (*Collector of Central Excise, Bangalore v. Raman Boards Limited*) had an occasion to deal with a situation of the nature which has arisen in the present writ petition and the Tribunal expressed the view that the prescription of limitation u/s 11-A does not mean

that even the revisional power of the Collector, a superior authority, could be equated to the limited power of review conferred upon the Assistant

Collector, an authority below in the hierarchy or that Section 35-E(3) could be rendered nugatory by reading into the said provision a limitation

stipulated u/s 11-A. The decision of the Calcutta High Court in *S. Venkatesan and Another Vs. Nihalchand Agarwala and Others*, has been

distinguished on the ground that the provisions of the Sea Customs Act, 1878 and that of the Central Excises and Salt Act, 1944 are not in *pari*

materia.

14. Another Bench of the CEGAT at New Delhi in two separate opinions rendered and reported in 1989 (43) ELT 115 and 1988 (37) ELT 22

(T)-Collector of Central Excise v. Universal Radiators Ltd., took a *contra* view holding that demand by the department for repayment of duty

erroneously refunded could be only u/s 11-A and within the time stipulated therefore and the period of limitation provided therein cannot be

circumvented by having recourse to Section 35-E of the Act.

15. In *Gokak Patel Volkart Limited Vs. Collector of Central Excise, Belgaum*, the Supreme Court has held that the provisions of Section 11-A(1)

and (2) of the Central Excises and Salt Act, 1944 make it clear that the statutory scheme is that in the situations covered by Sub-section (1) a

notice of show-cause has to be issued and Sub-section (2) requires that the cause shown by way of representation has to be considered by the

prescribed authority and then only the amount has to be determined. The said Scheme underlying the above provision was considered to be in

consonance with the rules of natural justice and, therefore, notice is a condition precedent to a demand under Sub-section (2). In AIR 1988 SC

236 (*Union of India v. Madhumilan Syntex Private Ltd.*), the Apex Court held that before any demand was made on any person chargeable in

respect of non-levy or short-levy or under-payment of duty a notice requiring him to show-cause why he should not pay the amounts specified in

the notice must be served on him and the admitted absence of a prior show-cause notice vitiated the impugned proceedings in that case. As a

matter of fact, it was also pointed out therein that u/s 11-A of the Act the notice can relate only to a period of six months prior to the issue of that

notice, except in cases where it was alleged that the short levy or short payment

has occurred by reason of fraud, collusion or wilful misrepresentation or suppression of facts or contravention of the provisions of the Act and the rules and the actual notice issued in that case could be of prospective consequence and the post facto show-cause notice could not be regarded as adequate in law. The decision reported in J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union of India (UOI) and Ors, is one where the Apex Court among other things was considering the question of the impact of Section 51 of the Finance Act, 1982 and the constitutional validity of giving retrospective effect to the amendments to Rules 9 and 49 of the Central Excise Rules from 28.2.1944, which provided for the collection of duty levied on the production of a commodity at an intermediate stage of an integrated process of manufacture of another commodity by deeming such production or manufacture of the commodity at an intermediate stage to be removal from such place or premises of manufacture. While repelling a challenge based upon Articles 14 and 19(1) (g) of the Constitution of India, the Apex Court held as follows:-

Under Section 11-A(1) the excise authorities cannot recover duties not levied or not paid or short-levied or short-paid or erroneously refunded beyond the period of six months, the proviso to Section 11-A not being applicable in the present case. Thus although Section 51, Finance Act, 1982 has given retrospective effect to the amendments of Rules 9 and provision of Section 11-A of the Act. We are unable to accept the contention of the learned Attorney General that as Section 51 has made the amendments retrospective in operation since Feb. 28, 1944, it should be held that it overrides the provision of Section 11-A. If the intention of the Legislature was to nullify the effect of Section 11-A, in that case, the Legislature would have specifically provided for the same. Section 51 does not contain any non obstante clause, nor does it refer to the provision of Section 11-A. In the circumstances, it is difficult to hold that Section 51 overrides the provision of Section 11-A. (para 32).

There is no provision in the Act or in the Rules enabling the excise authorities to make any demand beyond the periods mentioned in Section 11-A of the Act on the ground of the accrual of cause of action. The question that is really involved is whether in view of Section 51, Finance Act, 1982, Section 11-A should be ignored or not. In our view Section 51 does not, in any

manner, affect the provision of Section 11-A of the Act. In the absence of any specific provision overriding Section 11-A, it will be consistent with rules of harmonious construction to hold that Section 51, Finance Act, 1982 insofar as it gives retrospective effect to the amendments made to Rules 9 and 49 of the Rules, is subject to the provision of Section 11-A. (para 34)

16. After a careful consideration of the submissions of the learned Counsel appearing on either side in the light of the judicial pronouncements placed before me and the relevant provisions of law and the indisputable material of facts on record, I am of the view that the submissions on behalf of the petitioner have no merit and do not merit countenance in my hands. So far as the decisions of the Apex Court referred to before me are concerned, they had no occasion to deal with or decide the issue that is relevant or raised before me in this case. The observations made were merely on the scope of Section 11-A and the necessary formalities to be observed and the conditions to be satisfied for invoking the powers u/s 11-A of the Act. The impact of an interaction of the said provision with the provision contained in Section 35-A and Section 35-E was not at all considered in any of the decisions of the Apex Court but were in issue and considered only in the opinion expressed by some of the Tribunals and whereas the branch of the Tribunal at South had taken a view favourable to the Revenue, the Branch of the Tribunal at North took a view supporting the stand point of an assessee-manufacturer. a careful analysis and perusal of the orders of the Tribunal in 1989 (43) ELT 115 and 1988 (18) ECR 448 would go to show that greater emphasis and effect was given by them only to Section 11-A at the expense and in derogation of Section 35-E of the Act and in utter disregard of the jurisdiction of the authority exercising powers u/s 35-E of the Act. While the orders of the Tribunal proceeded to hold that there is nothing in any part of the Act that can counteract Section 11-A and that resort to Section 35-E cannot have the effect of nullifying Section 11-A and the time limit stipulated therein and that such an interpretation would have the effect of rendering Section 11-A otiose, they have totally lost sight of the position that dovetailing Section 11-A into Section 35-E would equally have the effect of nullifying and making Section 35-E wholly redundant and would also result in

completely obliterating the said provision from the statute itself. Such an interpretation also cannot be said to be a proper or reasonable one.

17. On a careful analysis of the provisions contained in Sections 11-A, 35-A and 35-E it could be seen that the powers conferred are upon

different authorities to be exercised in different circumstances and fact situations. Section 11-A(1) of the Act confers powers upon a Central

Excise Officer, in the nature of a review or reconsideration, though the proviso confers powers under certain specified circumstances upon the

Collector of Central Excise. It is only the Collector of Appeals who has been conferred powers u/s 35-A in an appeal filed by an assessee and

again u/s 35-E(4) in respect of a proceeding instituted by the department. In view of the above, one provision is not and cannot be also derogatory

of the other, either in respect of the power or the authority entrusted with such power under different provisions of the Act. In substance, those

provisions are mutually exclusive in their scope, extent and purport only and resort can be had to either one or more than one of such powers

depending upon the exigencies of the situation and the exercise of one is not destructive of the other. The dicta of the Apex Court in the decision in

The Bihar State Co-operative Marketing Union Ltd. Vs. Uma Shankar Sharan and another, may be usefully referred, though rendered under the

Bihar and Orissa Co-operative Societies Act, 1935. Regarding the availability of more than one remedy and the manner in which it could be

invoked or exercised, it was held as follows:-

The High Court has in its judgment assumed that whenever a specific remedy is made available in law the other remedy, more general in nature,

necessarily gets excluded.

6. Validity of plural remedies, if available under the law, cannot be doubted. If any standard book on the subject is examined, it will be found that

the debate is directed to the application of the principle of election, where two or more remedies are available to a person. Even if the two

remedies happen to be inconsistent, they continue for the person concerned to choose from, until he elects one of them, commencing an action

accordingly. In the present case there is no such problem as no steps u/s 40 were ever taken by the appellant. The provisions of Section 48 must,

therefore, be held to be available to the appellant for recovery of the loss.

7. Our view that a matter which may attract Section 40 of the Act will continue to be governed by Section 48 also if the necessary conditions are

fulfilled, is consistent with the decision of this Court in Prem Jeet Kumar Vs. Surender Gandotra and others, arising under the Delhi Co-operative

Societies Act, 1972. The two Acts are similar and Section 40 and 48 of the Bihar Act and Section 59 and 60 of the Delhi Act are in pari materia.

The reported judgment followed an earlier decision of this Court in Pentakota Srirakulu Vs. The Co-Operative Marketing Society Ltd., . We

accordingly hold that the High Court was in error in assuming that the application of provisions of Section 48 of the Bihar Act could not be applied

to the present case for the reason that Section 40 was attracted.

8. So far the question of limitation is concerned, it is true that as in the Delhi Act, a period of six years was fixed under the Bihar Act also by

second proviso u/s 40(1), which reads thus:

"Provided further that no order shall be passed under this sub-section in respect of any act or omission mentioned in Clause (a), (b), (c) or (d)

except within six years of the date on which such act or omission occurred."

It will be observed that the six years rule of limitation, however, is limited for the purpose of Section 40, and cannot govern the reference u/s 48.

The relevant provision of Section 48 is to be found in the proviso to Section 48(1) which has been quoted above. For determining its impact on the

present case, it is necessary to examine the proviso closely. Firstly, both the proviso and Section 63 of the Act are concerned only where the claim

is against a member. Even if the proviso be assumed to govern a dispute between the society and its past or present officer or servant it cannot

come to the aid of the present respondent-1 because he was dismissed from service on October 15, 1966 and he was directed to deposit the

disputed amount within 30 days therefrom. The dispute was referred for adjudication u/s 48 on December 12, 1966 and the reference was

registered as Award Case No. 25 of 1968 on August 3, 1968. Thus all these steps were taken within a period of two years. No reliance,

therefore, can be placed on either Section 32 or 63.

18. Similar issue has come up before this Court on more than one occasion under the Tamil Nadu General Sales Tax Act, 1959, of the relative

scope and effect of Section 16 and 32 or 34, of the said Act and the limitations

prescribed for the exercise of those powers. A Division Bench of this Court to which I was a party while following the decision of an earlier Division Bench in Venkateswara Metal Industries v. State of Tamil

Nadu 1989 (74) STC 364 held in the decision in T.D. Arumugam Chettiar and Co. v. The State of Tamil Nadu rep. by the Jt. Commr. of

Commercial Taxes-II Madras-5 1992 (2) MTCR 203 as hereunder:

In Venkateswara Metal Industries v. State of Tamil Nadu 1989 (74) STC 364, another Division Bench of this Court held as hereunder:-

"The revisional order passed by the Board of Revenue is within a period prescribed by that section. Therefore, the power of limitation prescribed

u/s 16 of the Act will not apply to the revision in the instant case. Further in the decision reported in D. Padmavathi Vs. The State of Tamil Nadu,

while considering the scope of Sections 16 and 32 (the revision by the Deputy Commissioner is analogous to Section 34) it is held as follows:-

... the two sections are mutually exclusive and give different powers to different authorities. Therefore, if action could be taken under one section, it

does not follow that action could not be taken under the other. Where it is possible to act under two provisions, the department may resort to the

one instead of the other and it cannot be compelled to proceed under only one of the two provisions. Section 32 provides for the examination of

the order passed by a subordinate authority under certain provisions set out therein. So long as the jurisdiction is exercised with respect to an order

contemplated by the section, there would be no error in the exercise of jurisdiction.

The Division Bench also held on the relative scope of Sections 16 and 34 in the following terms:-

On a consideration of the above decisions we are of the view that Sections 16 and 34 of the Tamil Nadu General Sales Tax Act are independent

and the limitation prescribed u/s 16 will not be applicable to a revision u/s 34 of the Act and in any event, in this case, since the original assessment

was not revised u/s 16 the limitation prescribed u/s 16 will not be applicable to a revision u/s 34. Further, we are of the view that Section 34 gives

wide power to reassess the turnover as in the case of the original assessing authority.

15. The exercise of powers, so far as the present case before us is concerned, is

one, in our view, squarely coming within the four corners of suo motu revisional powers conferred upon the Joint Commissioner u/s 34 of the Act and consequently there is no merit whatsoever in the plea made on behalf of the appellants that it has also to satisfy the period of limitation as prescribed u/s 16(1) of the Act. The provisions of Section 34 of the Act contain their own period of limitation and the exercise of power by the Joint Commissioner is well within the said period of limitation.

19. Consequently, in my view, there is absolutely, no warrant or justification to restrict the scope and amplitude of the powers of the Collector of

Appeals u/s 35-E by reading into it the provisions of Section 11-A of the Act. Such a construction is not permissible under any known or well

accepted principles of interpretation governing similar provisions, particularly in fiscal enactment and while construing provisions meant to prevent

evasion of tax liability. The plea that Section 11-A is a special provision and therefore cannot be allowed to be overtaken by Section 35-E or that

Section 11-A is a substantive provision unlike a procedural provision of the nature in Section 35-E has no rhyme or reason. An appellate or

revisional provision is as much a provision of law conferring substantive rights as a provision regulating refund or recovery of an amount

erroneously refunded. The decisions of the Apex Court were concerned with the scope of Section 11-A only and they have not dealt with the

relative scope of Section 11-A and the other provisions or the issue as to whether the provisions in Section 11-A have overriding effect on the

provisions in Section 35-A or 35-E or even as to whether Section 11-A has to be dovetailed into Section 35-A and 35-E of the Act, in cases of

recovery of erroneously refunded duty. Consequently, these decisions cannot be the authority to support the stand of the petitioners. For all the

reasons stated above, I am unable to subscribe to the view expressed by the Calcutta High Court or the CEGAT Bench at New Delhi, relied upon

for the petitioners.

20. The further plea that in view of the mandate in Section 35-E(4) that the application filed shall be heard and disposed of as if the same were an

appeal and consequently compliance with Section 11-A cannot be avoided in view of Section 35-A(3) second proviso, though would appear

attractive cannot merit acceptance. The specific stipulation is that "the

provisions of this Act regarding appeals including the provisions of Sub-section (4) of Section 35-B shall, so far as may be apply to such application", (emphasis supplied Here italicised). The two provisos incorporated to Section 35-A(3) deal with cases which are in the nature of suo motii exercise of power or the right of cross objections for the department in an appeal filed by an assessee appellant seeking relief for himself so far as against the order is against him (sic). Section 35-E is meant to confer a right upon the Department to file an application before the Collector of Appeals of course only on a direction from the Collector of Central Excise, for the determination of the points arising out of the order of an adjudicating authority, and it is only treated as an appeal for certain purposes. The specific stipulation in Section 35-E(4) that "such application shall be heard by the Appellate Tribunal or the Collector (Appeals), as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority", does not have the consequence of converting it as a regular appeal of an assessee subject to all the stipulations, including those which are required to be observed in passing an order against the interests of an assessee in his appeal. On the other hand, the words "shall be heard as if such application were an appeal so far as may be apply to such application" would go to show and lay emphasis to the fact that the hearing of the application shall be as if an appeal is to be heard and that too following the provisions relating to the hearing of the appeal so far as may be applicable and not in every sense. In an application filed u/s 35-E(4) on the directions of the Collector of Central Excise, the very issue would be against the interests of the assessee who has not himself filed an appeal, and there is no scope or occasion for forming an opinion by the Appellate Authority and then issuing any notice to the assessee. On the other hand, once an application has been filed u/s 35-E(4) notice has to be issued inevitably and automatically to the assessee and after hearing him the same should be disposed of as such and the assessee communicated with the order as visualised under Sub-section (4) and (5) of Section 35-A. The deeming of the application filed u/s 35-E(4) as if it were an appeal is only for such limited purpose and the same cannot be enlarged beyond its legitimate purpose. The submission for the petitioner to the contrary has no substance or merit whatsoever.

21. So far as the facts and circumstances of the case are concerned, there is no dispute that the impugned order came to be passed within the six months period visualised u/s 11-A and that notice of the application filed u/s 35-E(4) was also served upon the petitioner calling upon him also to file his cross objections, if any, and he was fully heard and then orders have been passed and communicated to the petitioner, also. There is no need to follow the procedure prescribed u/s 11-A once over again. So far as the facts and circumstances of the present case are concerned, it may also be taken that the provisions of Section 11-A have also been substantially and effectively complied with when the procedure u/s 35-E has been followed and notices have been issued and no legitimate or real grievance whatsoever could be made by the petitioners. There is also no substance or merit in the plea that the authority exercising power u/s 35-E(4) can only set aside the order of the adjudicating authority and cannot direct refund to the State or order recovery of the amount erroneously refunded. When the very order, as in this case, that is the subject matter in issue in the application filed u/s 35-E(4) is the earlier order of refund passed by the adjudicating authority, and the legality and propriety of passing such an order, while the Collector of Appeals sets aside such an order, the Collector of Appeals shall be entitled as of necessity to direct the return or repayment or recovery of the money erroneously refunded. Such powers are conserved to the Appellate Collector as a necessary and incidental power essential for the effective discharge of the jurisdiction u/s 35-E(4) of the Act. Otherwise, it would be a futile exercise of powers and such a construction cannot be countenanced at all by Courts and render an effective power conferred really purposeless or useless. The impugned order, therefore, does not call for any interference in these proceedings.

22. For all the reasons stated supra, the writ petition fails and shall stand dismissed. No costs.