Bajaj Auto Limited Vs Union of India (UOI)

Court: Bombay High Court

Date of Decision: Feb. 15, 2002

Acts Referred: Central Excises and Salt Act, 1944 â€" Section 11A, 11B, 11D, 35E, 35E(2)

Citation: (2002) 5 BomCR 207 : (2002) 105 ECR 798 : (2003) 151 ELT 23

Hon'ble Judges: V.C. Daga, J; J.P. Devadhar, J

Bench: Division Bench

Advocate: E.P. Bharucha, Manoj Sanklesh and Kerawala, instructed by Amarchand and Mangaldas and S.A. Shroff and Co, for the Appellant; R.V. Desai, Jetly and B.M. Chatterjee, instructed by H.D. Rathor, for the Respondent

Final Decision: Partly Allowed

Judgement

J.P. Devadhar, J.
Both petitions filed by M/s. Bajaj Auto Limited were heard together and with the conclusion of the submissions, Writ

Petition No. 3679 of 1989 was dismissed and Writ Petition No. 199 of 1993 was allowed for the reasons to be recorded later. Accordingly, we

record our reasons based on facts enumerated hereinafter.

2. Both these petitions were heard together since the cause of action in both these petitions originate from the amount already refunded by the

Respondents to the Petitioners. In Writ Petition No. 3679 of 1989, the Petitioners challenge the action of the Respondents in claiming excise duty

by redetermining the assessable value by including the amount of refund already granted, as price realisation u/s 4(4)(d)(ii) of the Central Excises

and Salt Act, 1944 ("Excise Act" for short). In Writ Petition No. 199 of 1993, the Petitioners challenge the show cause notice dated 2-9-1992

issued u/s 11A/11D of the Excise Act, as amended in 1991 to recover the entire amount refunded to the Petitioners in the year 1988.

FACTS-IN-BRIEF

3. Since the facts up to the date of grant of refund are common in both these writ petitions, it will be proper to set out the relevant facts up to the

date of grant of refund, before dealing with the controversy raised in these two petitions.

4. Bajaj Auto Limited manufactures two wheeled and three wheeled motor vehicles ("goods" for short) falling under Chapter 87 of the Central

Excise Tariff Act, 1985 and has factories in Pune and Aurangabad. The Company sells its goods all over India at the factory gate to over 200

dealers without any commission or discount.

5. By a show cause notice dated 20th March, 1985 the Respondents called upon the Petitioners to show cause as to why the wholesale dealers of

the Petitioners should not be treated as ""related persons"" and as to why the price charged by the dealers to the customers should not be treated as

assessable value for the purpose of excise duty instead of the value charged by the Petitioners to the wholesale dealers. In the light of the said show

cause notice, the Petitioners started clearing their goods under protest, by declaring dealer''s price to the customers as the assessable value and

paid excise duty accordingly. These facts can be understood by the following simple illustration :

Suppose

(i) the Petitioner''s price to the wholesale dealer is Rs. 1,000/-;

(ii) the dealer''s price to the customer is Rs. 1,500/-; and

(iii) the excise duty payable on those goods is 10%

Then

(i) according to the Petitioners, assessable value would be Rs. 1,000/- and excise duty payable thereon would be Rs. 100/-.

(ii) according to the Respondents, the assessable value should be Rs. 1,500/- and excise duty would be Rs. 150/-.

6. There is no dispute that the excise duty paid under protest by the Petitioners have been passed on to the consumers.

7. During the pendency of the aforesaid show cause notice, dated 20th March, 1985, the Apex Court in the case of Moped India Ltd. Vs. Asstt.

Collector of Central Excise, Nellore and Others, which is similar to the case of the Petitioners ruled that the dealers are not related persons and

hence the excise duty was liable to be determined only on the basis of the wholesale price charged by the manufacturer to the dealers. In view of

the above decision of the Apex Court, which was squarely applicable to the case of the Petitioners, the Respondents withdrew the show cause

notice dated 20th March, 1985. Thus, the assessable value at Rs. 1,000/- (as per the above illustration) was accepted. The excise duty on Rs.

1,000/- being Rs. 100/-, as per the above illustration, the excess amount of Rs. 50/- collected by the Respondents from the Petitioners became

refundable to the Petitioners.

8. The petitioners therefore filed a refund application dated 11th March, 1987 claiming refund of the excise duty paid under protest during the

period from May, 1985 to February, 1987. The Respondents kept the said refund application pending on the ground that the issue as to who,

whether the Petitioner or the Consumer, was entitled to claim refund was yet to be decided by the highest Judicial Authority. Challenging the

aforesaid action of the Respondents, the Petitioners filed Writ Petition No. 2171 of 1988 on the Appellate Side of this Court which, by judgment

and order dated 28th April, 1988 came to be disposed of by recording that Respondents have agreed that the position of law was settled in favour

of the Petitioners and that there was a bona fide mistake on their part in postponing the consideration of the refund claim of the Petitioners. By the

said judgment and order dated 28th April, 1988, this Court directed the Respondents to dispose of the refund application of the Petitioner on

merits within the time stipulated therein. Thus, it was accepted by the Excise authorities before this Court in the aforesaid petition that the refund

claim of the petitioners cannot be rejected or withheld on the ground that the amount refundable has already been recovered from the customers.

In other words, it was accepted by the Revenue authorities that even though the petitioners had recovered the amount from the customers they

were entitled to the refund as per the then prevailing provisions of the Excise Act.

9. Thereafter, the Respondents issued show cause notice dated 9-5-1988 calling upon the Petitioners inter alia to show cause as to why their

refund claim should not be rejected as time-barred u/s 11B of the Excise Act and refund if granted, why the assessable value should not be

redetermined by including the amount of refund in the assessable value and why excise duty should not be claimed on such redetermined

assessable value. In other words, as per the above illustrations, the Respondents called upon the Petitioners to show cause as to why the

assessable value of Rs. 1,000/- offered by the Petitioners should not be re-determined by including the refundable amount of Rs. 50/- having been

already recovered from the customers, and on such redetermined assessable value of Rs. 1050/- (Rs. 1,000/- Rs. 50/-), the excise duty should not

be levied @ 10%, which comes to Rs. 105/- and consequently the excise duty of Rs. 5/- (Rs. 100/- being already paid) should not be recovered

from the Petitioners.

10. The petitioners objected to such redetermination of the assess- able value. However, the Assistant Collector of Central Excise by a refund

order dated 23rd May, 1988 determined the amount refundable to the Petitioner at Rs. 3,92,23,437.77 and by following the Special Bench

Division of CEGAT in the case of Ashok Leyland, Madras, directed that the assessable value be redetermined by including the amount of refund

as price recovered and the differential duty as quantified may be recovered from the Petitioners. By an order dated 8-8-1988 the Superintendent

of Central Excise redetermined the value and demanded differential excise duty of Rs. 67,75,094.42 which the Petitioners paid under protest on

10-8-1988. Thus, the undisputed facts that emerge from the above are that the Respondents finally and unconditionally determined the amount of

refund at Rs. 3,92,23,437.77 and re-determined the assessable value by including the refunded amount as price received by the Petitioners and

levied and collected excise duty on such redetermined assessable value amounting to Rs. 67,75,094.42 u/s 4(4)(d)(ii) of the said Act.

The facts in both these petitions travelled together till this stage and have taken different routes as stated hereinafter.

Facts in Writ Petition No. 3679 of 1989

11. By this Writ Petition, the Petitioners have sought a Writ of Certiorari to quash the aforesaid order dated 8-8-1988 wherein the refund granted

to the petitioners, was treated as price of the goods realised by the petitioners and excise duty of Rs. 67,75,094.42 was claimed/recovered from

the petitioners. By this petition, the petitioners have sought refund of the said amount of Rs. 67,75,094.42 with interest thereon.

12. Mr. Bharucha, learned Counsel appearing on behalf of the Petitioners relied upon the decision of this Court in the case of Roche Products Ltd.

Vs. Union of India, and several other Tribunal decisions and contended that the amount of excise duty refunded cannot be included in the

assessable value and claim excise duty on such redetermined assessable value. On the other hand, Mr. Desai, learned Counsel for Respondents

contended that the decision of this Court in Roche Products Ltd. (supra) is not a reasoned order and, therefore, it would be just and proper to

follow the well reasoned Full Bench decision of the Karnataka High Court in the case of Union of India Vs. Alembic Glass Industries Ltd., which is

in favour of the Revenue. When it was pointed out that the decision of Karnataka High Court in the case of Alembic Glass Industries Ltd. (supra)

has been approved by the Apex Court in the case of Pravara Pulp and Paper Mills Vs. Collector of Central Excise, the learned Counsel for the

Petitioners fairly conceded that the issue is squarely covered by the aforesaid decision of the Apex Court against the petitioners. In this view of the

matter, the challenge to the order dated 8-8-1988 fails and accordingly this Petition is dismissed.

Facts in Writ Petition No. 199 of 1993

13. After granting refund on 23-5-1988 and after recovering Rs. 67,75,094.42 as differential excise duty from the Petitioners, by including the

amount refunded as price realised and redetermining the assessable value, the Respondents, in September 1988, on directions from the Collector

of Central Excise preferred an application u/s 35E(2) of the Excise Act, for setting aside the order of refund dated 23-5-1988 and for recovery of

the entire refunded amount of Rs. 3,92,25,437.77 on the sole ground that the Petitioners had already recovered the entire excise duty from the

customers and the refund order dated 23-5-1988 resulted in unjust enrichment to the Petitioners and hence the said order dated 23-5-1988 is

liable to be quashed and set aside. The said application filed u/s 35E of the Excise Act, in September, 1988 was disposed of by the Collector of

Central Excise (Appeals) on 9-6-1992- By the said decision, the refund order dated 23-5-1988 was set aside and the matter was remanded for

de novo adjudication as per the amended provisions of Central Excise Act which came into force with effect from 20-9-1991. In the light of the

said order, the Asstt. Collector, Central Excise issued a show cause notice dated 2-9-1992 calling upon the Petitioners to show cause as to why

the refund of Rs. 3,92,23,432.77 granted to them pursuant to order dated 23-5-1988 should not be recovered under Sections 11A and 11D of

the Excise Act and credited to the Consumer Welfare Fund established by the Central Government as envisaged u/s 12C of the Excise Act. This

petition has been filed by the petitioners to challenge the order of Collector (Appeals) dated 9-6-1992 and the consequent show cause notice

dated 2-9-1992 claiming recovery of the entire amount refunded to them, in the year 1988.

SUBMISSIONS

14. Mr. Bharucha, learned Counsel, appearing on behalf of the Petitioners submitted before us that Section 11B of the Excise Act as amended on

20-9-1991 is not applicable to the case of the Petitioners because on the date when the aforesaid amendment came into force, the refund claim of

the Petitioners was already adjudicated and the refund amount had already been granted to the Petitioners as per the decision of the Apex Court in

the case of Moped India (supra) and the refund had become final and conclusive. It was submitted that even in the application filed u/s 35E of the

Excise Act, which itself is beyond the scope of the original show cause notice dated 9-5-1988, the Respondents had neither disputed the grant of

refund on merits nor disputed the quantum of refund granted to the Petitioners. It was submitted that if at all the Respondents considered the refund

granted was erroneous, then the only course open to the Respondents was to invoke Section 11A and serve a notice to the Petitioners within 6

months from the relevant date as contemplated u/s 11A of the Excise Act. It was submitted that the impugned notice dated 2-9-1992 issued u/s

11A/11D of the Excise Act being beyond time, is liable to be quashed and set aside. It was submitted that Section 11D deals with duty of excise

collected from the buyers and not paid to the Central Government. It was submitted that Section 11D does not apply to a case where the amount

is refunded to an assessee by the department and hence Section 11D will not apply to the present case. It was submitted that even if Section 11D

of the Excise Act applies to the present case, then the limitation provided u/s 11A of the Excise Act has to be taken into account for the purpose of

taking action u/s 11D. It was submitted that Section 11D of the Excise Act does not have retrospective effect and since the refund was granted to

the Petitioners on 23-5-1988, much before the enactment of Section 11D in the year 1991, the said Section does not apply to the case of the

Petitioners. Alternatively, it was submitted that once the refunded duty was treated by the Revenue as part of the price of the goods and excise

duty was recovered on it by redetermining the assessable value, then the amount refunded ceased to be "duty" and became "price" of the goods

and in that event Section 11D would not be applicable to the case of the Petitioners, as Section 11D applies only to duty. It was submitted that for

the above reasons, the impugned order of Collector dated 9-6-1992 and the consequent show cause notice dated 2-9-1992 be quashed and set

aside.

15. On the other hand, Mr. Desai, learned Counsel, appearing on behalf of the Respondents submitted that the amended provisions of Section

11B of the Excise Act gave a statutory recognition to the theory of unjust enrichment and, therefore, while giving effect to the appellate order

passed on 9-6-1992, the amended provisions of Section 11B which came into force on 21-9-1991 will be applicable to the case of the

Petitioners. Relying on the decision of the Apex Court in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , it

was submitted that pendency of an application u/s 35E(2) of the Excise Act was a pending proceeding and hence the amended provisions of

Section 11B would be applicable to the case of the Petitioners. It was submitted that amendment to Sections 11B and 11D have retrospective

operation. It was submitted that refund granted to the Petitioners was not final and unconditional and in view of pending proceeding u/s 35E(2), the

refund would be governed by the amended provisions of Section 11B of the Excise Act. It was submitted that in view of the remand order passed

by the Collector (Appeals), the refund has to be brought back on the principle of restitution and Section 11A covers such a situation for which the

notice has been issued in the present case. In the alternative, it was submitted that as per Section 11D, the amount which has been collected by the

Petitioners has to be deposited forthwith to the credit of the Central Government. It was thus submitted that the impugned show cause notice does

not suffer from any infirmities and hence the petition is liable to be dismissed.

FINDINGS

16. Having heard the Counsel at length and having perused the material placed before us we are of the opinion that the Order of the Collector

(Appeals) dated 9-6-1992 and the show cause notice dated 2-9-1992 are untenable in law and hence the same are liable to be quashed and set

aside.

17. A perusal of the refund order dated 23-5-1988 (Exhibit-A to the petition) clearly shows that the refund granted was final and unconditional.

There is no dispute that the above refund was granted in view of the decision of the Apex Court in the case of Moped India (supra) and, therefore,

the issue of refund on merits was covered by the decision of the Apex Court and there is no dispute as to the quantum of refund granted either. In

fact, on finalisation of the refund, the Respondents have gone a step further and considering the refunded amount as price realised on sale of

manufactured goods, have redetermined the assessable value by including the refunded amount as ''price'' of the goods and claimed and collected

excise duty on it. As a matter of fact, having treated the amount of refund as a part of assessable value and having charged and recovered excise

duty thereon, in our opinion, the respondents have waived their right to contend that the refund was not final and unconditional. The act of

recovering the excise duty on the amount of refund treating it a part of assessable value, in our opinion, must preclude the Revenue to contend to

the contrary on the touchstone of doctrine of estoppel. Thus, considering the conduct of the Revenue, they are estopped for contending that refund

was not final and unconditional. The Revenue itself treated it as unconditional, final and conclusive and regarded it as a part of assessable value.

The moment the amount of refund was treated as a part of assessable value, in our opinion, it ceased to be ''duty'' in the eye of law. Therefore, it is

evident that the refund granted by order dated 23-5-1988 was accepted by the Revenue as final and unconditional.

18. Although, an appeal was filed against the refund order dated 23-5-1988, a perusal of the memo of appeal filed by the Respondents shows that

neither the claim of refund was disputed nor it was contended that the refund granted was contrary to any of the provisions of the Excise Act. It

was not even disputed that the refund granted was not in conformity with the provisions of Section 11B of the Excise Act as it then stood. As per

Section 11B of the Excise Act as it stood in 1988, the Petitioners who had paid the duty were entitled to seek refund and the same was rightly

granted to them. There was no provision under the Excise Act to deny refund on the ground that the duty paid has been collected by the petitioners

from their customers. There was no provision to deny refund on the ground of unjust enrichment and excise authorities being bound by the

provisions of the Excise Act could not have rejected the refund claim by importing the plea of unjust enrichment which was not on the statute. In

fact, in Writ Petition No. 2171 of 1988, the Respondents admitted before this Court that the Excise Authorities were in error in withholding the

refund claim of the Petitioners on the ground of unjust enrichment. Thereafter, the Respondents having processed the refund claim and having

granted the refund, could not have filed application u/s 35E(2) of the Excise Act and challenge the refund order dated 23-5-1988 solely on the

ground of unjust enrichment. It is relevant to note that the refund order dated 23-5-1988 was passed on the refund application of the petitioners by

issuing a show cause notice dated 9-5-1988. In the said show cause notice dated 9-5-1988, the issue raised was, why the refund claim should not

be rejected as time-barred u/s 11B of the Excise Act and why refund if granted should not be included in the assessable value and redetermine the

assessable value and claim excise duty. Issue of unjust enrichment was not there while passing the refund order on 23-5-1988 and in fact, no such

plea could have been raised in view of the Revenue admitting before this court in Writ Petition No. 2171 of 1988 on 28-4-1988 that the excise

authorities cannot withhold refund on the ground of unjust enrichment. Therefore, the application filed by the Revenue u/s 35E of the Excise Act on

the ground of unjust enrichment was beyond the scope of the show cause notice dated 9-5-1988 and was in flagrant violation of their statement in

writ petition No. 2171 of 1988. In any event, the pendency of such an application u/s 35E(2) cannot be said to be a pending proceeding pertaining

to refund and even the Collector (Appeals) could not have held that the refund granted on 23-5-1988 was contrary to the provisions of Section

11B as it then stood. Therefore, in our opinion, the refund granted being final and unconditional and conclusive, the pendency of the application u/s

35E(2) on the sole ground of unjust enrichment was beyond the scope of Excise Act and hence could not be held to be a pending proceeding

under the Excise Act. Thus, the refund granted to the Petitioners on 23-5-1988 was in accordance with the provisions of the Excise Act and could

not be said to be erroneous refund. Therefore, the order of Collector (Appeals) dated 9-6-1992 passed on the said application u/s 35E(2) of the

Excise Act and the consequent show cause notice dated 2-9-1992 are bad in law.

19. Even assuming, for any reason, the Respondents could consider the refund to be erroneous then and in that event the proper course open to

the Respondents was to issue notice u/s 11A of the Excise Act within six months from the relevant date and then file application u/s 35E(2) of the

Excise Act. However, in this case, the Respondents, without issuing notice u/s 11A, have only filed application u/s 35E(2) of the Excise Act. The

refund was granted with the knowledge that the plea of unjust enrichment was not available at the relevant time and if the Respondents even after

granting refund considered the refund to be erroneous on account of unjust enrichment and wanted to keep the issue alive, then they ought to have

issued notice u/s 11A of the Excise Act. Failure to issue such notice is fatal and the impugned notice issued beyond the period of 6 months u/s 11A

is liable to be held to be bad in law.

20. The respondents have placed strong reliance on the decision of the Apex Court in the case of Mafatlal Industries Ltd. (supra) and in particular

paras 87 and 88 of the said decision and submitted that the plea of unjust enrichment was available even prior to the amendment of 11B on 20-9-

1991 and in any event since the application u/s 35E(2) was a pending proceeding, the amended provisions were applicable to the case of the

Petitioners. In our opinion, the submission is devoid of any merit because the case of the Petitioners cannot be said to be falling within the category

of "pending proceedings", as held by the Apex Court. In the Mafatlal"s case (supra), the Apex Court has not laid down any proposition that on

account of filing an application u/s 35E(2), the Respondents are absolved of their obligation from issuing a notice u/s 11A of the Excise Act for

recovery of erroneous refund within 6 months from the relevant date. Section 11A(3) defines relevant date as follows : -

11A(3) for the purpose of this Section -

(i) -------

(ii) "relevant date" means -

(a) .....

(b) .....

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

Therefore, mere filing of an application u/s 35E does not absolve the Respondents from their obligation to issue notice u/s 11A and if such notice

u/s 11A is issued beyond the period of 6 months from the relevant date, then the same being time-barred u/s 11A is liable to be quashed. Under

the Excise law, notice u/s 11A for recovery of erroneous refund is required to be issued within 6 months from the relevant date unless the case is

covered under the proviso to Section 11A(1). It is not the case of the Respondents that the proviso to Section 11A(1) is applicable to the case of

the Petitioners. In that view of the matter, the impugned notice u/s 11A/11D, dated 2-9-1992 issued beyond the period of six months from the

relevant date must be held to be bad in law. This view of ours is fortified by the two decisions of the Apex Court in the case of Collector of Central

Excise, Bhubaneswar Vs. Re-Rolling Mills, and the decision of the Apex Court in the case of Union of India and others Vs. Jain Shudh Vanaspati

Ltd. and another, wherein it is held that the notice for recovery of the amount erroneously refunded can be issued without revising the refund order.

In other words, the Apex Court in those cases has held that pendency of 35E proceedings do not absolve the Respondents from their obligation to

issue notice for recovery of erroneous refund u/s 11A of the Excise Act. In the instant case no such notice has been issued within the time-limit

prescribed u/s 11A of the Excise Act.

21. Apart from the above, the emphasis laid by the respondents on a sentence in para 87 of the decision in Mafatlal''s case (supra) viz.: -

87...where the duty has been refunded under the orders of the Court pending disposal of an appeal, writ or other proceedings, it would not be a

case of refund finally and unconditionally, as explained in Jain Spinners and ITC.....

cannot be stretched too far, so as to include the case of the Petitioners. In the Petitioner''s case, the refund has not been made pursuant to any

Court order. In Writ Petition No. 2171 of 1988, this Court, on the basis of the admission on the part of the Respondents, directed them to decide

the refund claim in accordance with law. The said order in Writ Petition No. 2171 of 1988 was accepted by the Revenue. Thereafter, the refund

was granted finally and unconditionally as per the provisions of Excise Act. The application u/s 35E(2) of the Excise Act was not filed on the

ground that the refund granted was in violation of any of the provisions of the Excise Act and the only plea of unjust enrichment raised was not

available under the Excise Act. Thus, in our opinion, in the facts of the present case, neither the pendency of the application u/s 35E(2) could be

considered to be ''pending proceeding'' pertaining to grant of refund so as to attract the amended provisions of Section 11B, nor the notice dated

2-9-1992 can be sustained, it being time-barred u/s 11A of the Excise Act.

22. Strong reliance has been placed by the Counsel for the Respondents on the decision of the Apex Court in the case of Union of India (UOI)

and Another Vs. Raj Industries and Another, . In that case, the refund claim was rejected by the excise authorities and in a writ the High Court

ordered refund and during the pendency of further appeal before the Apex Court, Section 11B was amended and in that context, before granting

finality to the refund ordered by the High Court, the Apex Court remanded the matter for adjudication as per the amended Section 11B of the

Excise Act. In the present case, the refund granted is not pursuant to the order of this Court in Writ Petition No. 2171 of 1988. Here, the

Respondents admitted before this Court that the refund claim of the petitioners will be processed without raising the plea of unjust enrichment and

accordingly processed the claim and granted refund in accordance with the provisions of the Act. Hence, the decision of the Apex Court in the

case of Raj Industries (supra) is not applicable to the facts of this case. Neither in the Mafatlal''s case (supra) nor in the Raj Industries case (supra),

it is held by the Apex Court that prior to 20-9-1991, the excise authorities could reject the refund claim on the ground of unjust enrichment. It is a

well established principle in law, that the authorities under Act are bound by the provisions of the Act and in the present case, at the relevant time,

there being no provision relating to unjust enrichment, the refund claim could not be rejected on that ground by the Excise authorities. Though the

Excise authorities constituted under the Excise Act could not reject the refund claim on the ground of unjust enrichment, the Writ Court while

exercising its jurisdiction under Article 226, could reject the refund claim if filed directly in the High Court, on the ground of unjust enrichment. In

the Raj Industries case (supra) as the Writ Court had granted refund, without considering the principle of unjust enrichment, the Apex Court in the

Appeal arising out of the order passed by the High Court, held that in view of the amendment, the claim be processed under the amended

provisions. Thus, the decisions of the Apex Court in Raj Industries case do not support the contention of the Respondents.

23. While considering the scope of recovery of excise duty u/s HA of the Excise Act, on account of retrospective amendment to Rules 9 and 49 of

Central Excise Rules 1944 by Finance Act, 1982, the Apex Court in the case of J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union

of India (UOI) and Ors, , held in Para Nos. 31 and 33 as follows :-

31. u/s 11A(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 11A not being applicable in the present case. Thus, although Section 51 of the Finance Act, 1982

has given retrospective effect to the amendments of Rules 9 and 49, yet it must be subject to the provision of Section 11A 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

February 28, 1944, it should be held that it overrides the provision of Section 11A. If the intention of the Legislature was to nullify the effect of

Section 11A, 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 11A. In the circumstances, it is difficult to hold that Section 51 overrides the provision of Section 11A.

32. .....

33. 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

11A 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 of the Finance

Act, 1982, Section 11A should be ignored or not. In our view, Section 51 does not, in any manner, affect the provision of Section 11A of the Act.

In the absence of any specific provision overriding Section 11A, it will be consistent with rules of harmonious construction to hold that Section 51

of the 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 11A.

Thus, the Apex Court held, that, even when the Revenue is entitled to recover excise duty on account of retrospective amendment to the"" Excise

Rules, recovery will be subject to the limitation prescribed u/s 11A of the Excise Act. In other words, even the amendment, which empowered the

Revenue to recover excise duty with retrospective effect, in the absence of non obstante clause in the amendment, recovery will be governed by

the limitation prescribed u/s 11A of the Excise Act. Applying the ratio of the above decision to the facts of the present case, the impugned notice

u/s 11A of the Act, dated 2-9-1992, though issued pursuant to the order of the appellate authority, it being issued beyond the period of six months

from the relevant date, for recovery of the erroneous refund, is barred by limitation and hence is liable to be quashed and set aside.

24. In a subsequent judgment in the case of J.K. Cotton Spinning and Weaving Mills Company Ltd. Vs. Collector of Central Excise, the Apex

Court had occasion to consider the elasticity permissible u/s 11A for issuing notice for recovery of erroneous refund. In Para No. 6 of its

judgment, the Apex Court held as under : -

6. The period of six months envisaged in Sub-section (1) thereof can thus be extended only under three eventualities. First is, if the impairment of

the levy is attributable to any fraud, collusion or wilful misrepresentation or suppression of facts, the period of six months will stand stretched up to

five years. The second eventuality is, if the original assessment was provisional, in which case the period would start running only from the date of

final assessment. The third is, if the service of show cause notice on the person chargeable with duty is stayed by a court, in which case the entire

period of stay shall be excluded from computing the aforesaid limitation time.

In the present case, none of the aforesaid eventualities are existing so as to extend the period of limitation for issuing notice u/s 11A of the Excise

Act. Thus, the limitation of six months from the date of relevant date for recovery of the erroneous refund would have to be restricted to six months

from the relevant date. Under the circumstances, the show cause notice impugned in the present case, issued u/s 11A of the Act, being time

barred, is liable to be quashed and set aside.

25. Moreover, the Central Board of Excise and Customs, after obtaining opinion of the Law Ministry, vide Circular No. 423/56/98-CX., dated

22-9-1998, has clarified that erroneous refund cannot be recovered by mere filing an application u/s 35E(2) of the Excise Act, unless notice u/s

11A is issued within the stipulated time. The relevant portion of the above Circular, reads as under :-

.....In this context the point to be stressed is that the Order passed u/s 35E(2) does not automatically result in the recovery of the refund. This has

to be followed by SCN u/s 11A which should be issued within 6 months from the date of actual refund. Since time-limit for filing appeal u/s 35E(2)

is longer than the time-limit prescribed u/s 11A, the SCN should proceed (sic) the proceedings u/s 35E(2).

.....In view of above, it is clarified that timely demands should invariably be raised (within six months normal period) u/s 11A of the

Act.

From the aforesaid Circular of the Government, which is in consonance with our view, it is accepted by the Government that issuance of notice u/s

11A of the Excise Act within 6 months from the relevant date is mandatory even if the time-limit for filing appeal u/s 35E(2) is longer than the time-

limit prescribed u/s 11A. In other words, if an appeal u/s 35E(2) is filed in time and notice u/s 11A is not issued within 6 months from the relevant

date, and if the notice is issued belatedly after the order u/s 35E, then, in spite of the order in appeal u/s 35E(2), the Revenue will not be entitled to

recover the erroneous refund, it being time-barred. It is a well established principle in law that C.B.E.C. Circulars are binding on the Revenue. The

above Circular being issued in the light of the decision of the Apex Court in the case of Re-Rolling Mills (supra) and in the light of the opinion of

Law Ministry, is binding on the Revenue and contrary agreements cannot be advanced by the Revenue. In this view of the matter, in the present

case, the relevant date of refund being 23-5-1988, the notice u/s 11A, issued on 2-9-1992, is obviously beyond 6 months from the relevant date

and hence, it is barred by limitation.

26. Having held that the impugned notice dated 2-9-1992 is barred by limitation u/s 11A of the Act, let us consider as to whether the said notice

dated 2-9-1992 can be saved u/s 11D of the Excise Act. Under the Excise Act, Sections 11A and Section 11D operate in different fields. Section

11A deals with the powers of the Excise Officer to recover duties not levied or not paid or short-levied or short-paid or erroneously refunded.

Whereas, Section 11D deals with the obligation on the part of the person who had collected excise duty from the buyer but not paid to the

Government to forthwith pay the amount so collected to the credit of the Central Government. Sub-section (2) to Section 11D clearly provides

that where a person collects excise duty on excisable goods but does not pay the same, then under Sub-section (1) of Section 11D such person is

required to pay the amount to the Central Government and on finalisation of the assessment on excisable goods, the amount so deposited would be

adjusted against the duty liability, if any, and the surplus would be either credited to the fund or refunded as the case may be. Thus, it is clear that

Section 11D deals with duty of excise collected from the buyers and not paid to the Central Government. In the present case, the amount collected

has been paid to the Central Government and hence the case of the Petitioners cannot be said to be falling within the ambit of Section 11D of the

Excise Act.

27. The meaning and purport of Section 11D of the Excise Act was considered by the Apex Court in the case of Mafatlal Industries (supra).

Relevant portion in Para 97 of the said decision reads as under : -

.....All that the section says is this : the amount collected by a person/manufacturer from the buyer of goods as representing duty of excise shall

be paid over to the State; even if the tax collected by the manufacturer from his purchaser is more than the duty due according to law, the whole

amount collected as duty has to be paid over to the State; if on the assessment being made it is found that the duty collected and paid over by the

manufacturer is more than the duty due according to law, such surplus amount shall either be credited to the Fund or be paid over to the person

who has borne the incidence of such amount in accordance with the provisions of Section 11B. It is obvious that if in a given case, the

manufacturer has collected less amount as representing the duty of excise than what is due according to law, he is not relieved of the obligation to

pay the full duty according to law. This is the general purport and meaning of Section 11D.....

From the aforesaid findings of the Apex Court, it is clear that the petitioner''s case where the entire amount collected from the customers has been

offered to tax is not covered u/s 11D of the Excise Act.

28. Since we have held that Section 11D is not applicable to the present case, it is not necessary for us to deal with the arguments advanced

before us regarding the retrospectivity of Section 11D or whether Section 11D can be invoked by issuing notice within the period of limitation

prescribed u/s 11A of the Excise Act. Counsel for the petitioners relied upon the decision of the Madras High Court in the case of Gem Cables

and Conductors Ltd. Vs. Collector of Customs, Hyderabad, and submitted that since the notice u/s 11D is issued beyond the period of 6 months

prescribed u/s 11A of the Act, the same is barred by limitation. It is not necessary for us to go into these aspects, in view of our findings to the

effect that Section 11D is not applicable to the case of the petitioners. Moreover, the Respondents have treated the amount refunded by them, as

price of the goods realised by the petitioners and have recovered excise duty thereon, cannot now contend that the amount refunded by the

Revenue still retains the character of ''duty''. Once, the refunded amount is considered by the Revenue as ''price'' of the goods, and has recovered

duty thereon by reassessment, the question of invoking Section 11D does not arise at all.

29. In this view of the matter, the petition succeeds. The order dated 9-6-1992 (Exhibit-''I'') and impugned notice dated 2-9-1992 (Exhibit-''J'')

are quashed and set aside. Rule is made absolute accordingly in terms of prayer Clause (a) of the petition.

30. Thus, Writ Petition No. 3679 of 1989 is dismissed and Writ Petition No. 199 of 1993 is allowed. However, in the facts of the case, there will

be no orders as to costs.