

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Excise Appeal No. 338 of 2012

(Arising out of Order-in-Original No. 13/Commr/M-II/2011 dated 30.11.2011/12.12.2011 passed by the Commissioner of Central Excise, Mumbai-II)

M/s. CNH Industrial (India) Pvt. Ltd.

Appellant

(Earlier known as New Holland Fiat (India) Pvt. Ltd.
B-1-207, Boomerang, Chandivali Farm Road,
Near Chandivali Studio,
Andheri (E), Mumbai 400 072.

Vs.

Commissioner of Central Excise, Mumbai-II

Respondent

9th Floor, Piramal Chambers, Jijibhoy Lane,
Lalbaug, Parel, Mumbai 400 012.

WITH

Excise Appeal No. 362 of 2012

(Arising out of Order-in-Original No. 13/Commr/M-II/2011 dated 30.11.2011/12.12.2011 passed by the Commissioner of Central Excise, Mumbai-II)

M/s. Spectra Automobiles

Appellant

Shiv Anand, Near St. John High School,
S.V. Road, Goregaon (W), Mumbai 400 062.

Vs.

Commissioner of Central Excise, Mumbai-II

Respondent

9th Floor, Piramal Chambers, Jijibhoy Lane,
Lalbaug, Parel, Mumbai 400 012.

WITH

Excise Appeal No. 440 of 2012

(Arising out of Order-in-Original No. 13/Commr/M-II/2011 dated 30.11.2011/12.12.2011 passed by the Commissioner of Central Excise, Mumbai-II)

M/s. Nav Bharat Motor Agency

Appellant

Railway Lines, P.B. No.58, Solapur 413 001.

Vs.

Commissioner of Central Excise, Mumbai-II

Respondent

9th Floor, Piramal Chambers, Jijibhoy Lane,
Lalbaug, Parel, Mumbai 400 012.

AND

Excise Appeal No. 509 of 2012

(Arising out of Order-in-Original No. 13/Commr/M-II/2011 dated 30.11.2011/12.12.2011 passed by the Commissioner of Central Excise, Mumbai-II)

M/s. Bombay Cycle & Motor Agency Ltd.

Appellant

534, SVP Road, Kurla (W), Mumbai 400 070.

Vs.

Commissioner of Central Excise, Mumbai-II

Respondent

9th Floor, Piramal Chambers, Jijibhoy Lane,
Lalbaug, Parel, Mumbai 400 012.

Appearance:

Ms. Kanupriya Bhargav with Ms. Divya Bhardwaj, Advocates, for the Appellant in appeal E/338/2012.

Shri Mihir Mehta with Shri Mohit Rawal, Advocates, for the Appellants in appeals E/440 & 509/2012.

None for the Appellant in appeal E/362/2012

Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised Representative for the Respondent in appeal E/338/2012.

Shri Dharendra Kumar, Joint Commissioner, Authorised Representative for the Respondent in appeals E/440 & 509/2012.

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 12.12.2022

Date of Decision: 22.12.2022

FINAL ORDER NO. A/86232-86235/2022

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original No 13/Commr/M-II/2011 dated 30.11.2011/12.12.2011 of the Commissioner Central excise Mumbai II. By the impugned order following has been held:

"ORDER

1. I have confirmed the demand of Rs. 20,88,391/- (Rupees Twenty Lakhs Eighty Eight Thousand Three Hundred Ninety One Only) erroneously refunded to M/s Fiat India Ltd. Under proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944.

2. The assessee is eligible for refund claim of Rs.15,92,889/- (Rupees Fifteen Lakhs Ninety Two Thousand Eight Hundred Eighty Nine Only), which they should claim with the jurisdictional

Assistant/Deputy Commissioner in terms of Section 11B of Central Excise Act, 1944

3. I impose Penalty of Rs. 20,88,391/- on M/s Fiat India Ltd. Under Section 11AC of Central Excise Act, 1944

4. I charge and demand interest at appropriate rate per annum from M/s Fiat India Ltd. on the entire amount of duty erroneously refunded to them under Section 11AB of Central Excise Act, 1944.

5. I impose a penalty of Rs. 10,00,000/- on M/s PAL under Rule 209 A of the Central Excise Rules, 1944.

6. I impose following penalties on dealers under Rule 209A of Central Excise Rules, 1944.

<i>i</i>	<i>M/s Bombay Cycle & Motor Agency Ltd. 534,S.V.P. Road Mumbai-400070</i>	<i>Rs.6,00,000/-</i>
<i>ii</i>	<i>M/s Credit Line Motors Ltd. Shahaney Kirkwood Compound 27,Kiro! Road, Vidyavihar (W) Mumbai-400086</i>	<i>Rs.3,00,000/-</i>
<i>iii</i>	<i>M/s Spectra Automobiles Shiv Anand, Near St. John High School, S.V.Road, Goregaon(West), Mumbai-400062</i>	<i>Rs.3,00,000/-</i>
<i>iv</i>	<i>M/s Nav Bharat Motor Agency Railway Lines, P.B.No.58 Solapur-413001</i>	<i>Rs.1,00,000/-</i>
<i>v</i>	<i>M/s Shamam Automobiles Pvt. Ltd. Madhu Kunj, Sayani Road Prabhadevi Mumbai-400 025</i>	<i>Rs.1,00,000/-</i>
<i>vi</i>	<i>M/s Ashwamegh Auto Ltd. 685/1,Bibewadi Pune Satar Road Pune-411037</i>	<i>Rs.25,000/-</i>
<i>vii</i>	<i>M/s National Garage A-105,Neeti Gurav Complex Central Bazar Road, Ramdas peth Nagpur-440010</i>	<i>Rs.1,00,000/-</i>

7. No penalty is imposed on M/s Jay Vijay Motors Pvt. Ltd. as their name did not figure in the list of dealers who fraudulently withheld the amount due to ultimate buyers of Taxis under Notification No. 4/97-CE dated 1.3.97”

2.1 Appellant 1 were manufacturing and clearing motor cars after payment of full rate of Central Excise duty @ 40% ad-valorem. They were also engaged in the manufacture of Premier Padmini (PP) model cars, apart from their own models, on job

work basis for a merchant manufacturer M/s Premier Automobiles Ltd. (M/s PAL). Many of their PP model cars were being converted into 'metered taxis' subsequently. M/s FIL had been availing of benefit of Notfn. No. 4/97 CE dtd. 1.3.97, as amended, for refund of Central Excise duty @ 15% /16% ad-valorem on motor cars which subsequently had been registered as 'TAXI' with RTO after clearance.

2.2 M/s PAL appointed the M/s Spectra Automobiles (Appellant 2), M/s Nav Prabhat Motor Agency (Appellant 3), M/s Bombay Cycle & Motor Agency Ltd. (Appellant 4), M/s Jay Vijay Motors Pvt. Ltd., M/s Ashwamegh Auto Pvt. Ltd., M/s Creditline Motors Pvt. Ltd., M/s Shamam Automobiles Pvt Ltd., M/s National Garage as dealers for selling the PP model cars in Mumbai and at different places:

2.3 Appellant being a manufacturer submitted the claim of refund of Central Excise duty along with the documents as prescribed. These refund claims were sanctioned and granted by the Divisional Assistant / Deputy Commissioner.

2.4 Subsequently information was received by the department that appellant has fraudulently claimed refund of differential Central Excise duty on account of PP model cars converted into taxis, for which cheques were issued in favour of the taxi owners but the amounts mentioned on the cheques had not been actually passed on to the taxi owners, investigations were undertaken by the revenue authorities.

2.5 On completion of investigations a show cause notice dated. 23.7.2001 was issued to the appellant 1:-

- i. demanding the duty amounting to Rs.3,07,83,604/- erroneously refunded under proviso to Section 11A(1) of the Central Excise Act, 1944;
- ii. proposing rejection of refund claims amounting to Rs. 17,81,002/- under Rule 173S of Central Excise Rules, 1944 read with Section 11B of Central Excise Act, 1944;
- iii. charging and demanding interest @ 20% p.a. under Section 11AB of the Central excise Act, 1944 on the entire amount of duty erroneously refunded to them.

2.6 The said show cause notice also proposed imposition of penalty on M/s PAL, a merchant manufacturer, and the dealers, under Rule 209A and / or Rule 210 of erstwhile Central Excise Rules, 1944 and / or Rule 26 of the Central Excise (No. 2) Rules, 2001 / Central Excise Rules, 2002 for their active role in aiding and abetting M/s FIL for committing the said offence by willfully submitting false and misleading information / documents.

2.6 The said Show Cause Notice was adjudicated by the then Commissioner of Central Excise, Mumbai-II vide Order-In-Original No.05/2002 dated 5.2.2002 and passed the following order: -

- (a) Confirmed the demand of Rs.3,07,83,604/- erroneously refunded to M/s FIL under proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944 along with interest under Section 11AB of the Central Excise Act, 1944;
- (b) Rejected and disallowed the refund claim amounting to Rs.17,81,002/- as per Rule 1735 of Central Excise Rules, 1944 read with Section 11B of Central Excise Act, 1944;
- (c) imposed penalty of Rs.3,07,83,604/- on M/S FIL under Section 11AC of the Central Excise Act, 1944;
- (d) imposed penalty of Rs. 2,00,00,000/- on M/s PAL under Rule 209A of Central Excise Rules, 1944 read with Rule 26 of Central Excise Rules, 2001;
- (e) imposed penalty of Rs. 1,00,00,000/- on the dealers under Rule 209A of Central Excise Rules, 1944 read with Rule 26 of Central Excise Rules, 2001;

2.7 Aggrieved by the said order-in-original, M/S FIL, M/s PAL and other 8 co- noticees preferred appeals before CESTAT. CESTAT vide order no. A/466 to 504/WZB/05/C II dated 27.10.2004/17.6.2005 remanded the matter back to original authority observing that:

- in terms of notification No. 5/98 dated 1.6 98, there is no requirement to produce evidence of return of the excess amount paid on the vehicles registered as taxi to the ultimate taxi owners and it is enough to return the said amount to the buyer which in this case is PAL.

- requirement of refunding duty to the registered taxi owners was there under Notification No. 4/97 and it is for this period only that the revenue could look into as to whether the refund was actually passed on to individual taxi owners or not.

2.8 Commissioner, Central Excise, Mumbai-II vide Order-In-Original No. 11/Commr/M-II/2007 dated 29.3.2007 decided the issue in remand proceedings

- a. confirming the demand of Rs.2,68,38,851/- along with interest after adjusting Rs.75,18,967/- already paid in cash by Appellant 1 to M/s PAL;
- b. imposed penalty of equal amount on Appellant 1; and
- c. imposed a penalty of Rs.30.00 Lakhs on PAL and of varying amounts on seven dealers.

2.9 Aggrieved by the order-in-original dated 29.3.2007, Appellant 1, M/s PAL and other 5 dealers preferred appeals before Hon'ble CESTAT .The Hon'ble CESTAT vide Order A/853-859/07/C-I/EB dated 19.11.07 set aside the Order dated 29.3.2007 and remanded the case to Commissioner, Central Excise, Mumbai-II for de-novo adjudication.

3.0 Commissioner has by the impugned order adjudicated the matter in remand proceeding. Aggrieved by the impugned order Appellants have preferred theses appeals:

3.1 We have heard Ms Kanupriya Bhargava with Ms. Divya Bhardwaj, Advocates for Appellant 1, None for Appellant 2 and Shri Mihir Mehta and Shri Mohit Rawal, Advocates for Appellant 3 and Appellant 4. We have also heard Shri Amrendra Kumar Jha, Deputy Commissioner and Shri Dharendra Kumar, Joint Commissioner, Authorized Representatives for the revenue.

3.2 Arguing for the Appellant 1 learned counsel submits:-

- Undisputedly the Refund claims filed by the appellant for Rs 3,07,83,604/- were after due consideration were sanctioned by the jurisdictional authorities in the favour of Appellant 1. None of the order sanctioning the refund claim was ever reviewed by the revenue authorities for filing an appeal to the appellate authorities, and the Show Cause Notice dated 23.07.2001 was issued to them by the

Commissioner for recovery of the erroneous refund by invoking extended period as per Section 11A of the Central Excise Act, 1944. The show cause notice issued to them in terms of the Section 11A, without review of the orders sanctioning the refund claim is bad in law as have been held by Hon'ble Madras High court in the case of Eveready Industries India Ltd. [2016-TIOL-676-Mad-CX]

- The total amount of demand confirmed against the appellant as evident from the impugned order can be grouped in three heads as follows:
 - Mismatch in name of Taxi Owners: Rs 2,86,186.00
 - Mismatch in Registration Documents etc: Rs 1,57,321.00
 - Amounts not paid to the ultimate taxi owners: Rs 16,44,883.79
- As per the CESTAT order dated 17.06.2005, in cases where the refund has been claimed as per the Notification No 5/98- CE, the Appellant is not required to prove that the refund has been paid to the ultimate buyer or not. It is not even in dispute that the amount claimed as refund by them allowed in their favour has been paid to dealers. The total amount of the refund claim in this respect is Rs 15,67,714.98/-.
- The amount of Rs 80,169.75 is within the Notification No 4/97-CE and is in respect of three taxi owners.
- The demand for amount of Rs 2,86,186/- has been confirmed against them for the reason of mismatch in the name of the taxi owners and the documents submitted by the appellant evidencing the payment of the refund to the beneficiary. The said mismatch in respect of eleven such beneficiary was due to the reason that in some case the amounts were paid to the legal heir and in some cases there were clerical errors which have been explained in the paper book. As entire cases of mismatch can be explained the demand confirmed in respect of the refunds made to these 11 beneficiaries cannot be upheld.
- Amount of Rs 1,57,321/- has been confirmed against them citing the minor mismatches in the engine numbers

mentioned in Show Cause Notice and the Registration Certificates. These mismatches in respect of the 6 taxi owners too can be explained.

- Appellant has not in any way benefitted from any of the above transactions and have paid the entire amounts to PAL in the first instance. However subsequently when appellant came to know that PAL has not made the payments to ultimate taxi owners, they paid the amount again to the ultimate taxi owners. They themselves were the victim of fraud and no case can be made against them for imposition of penalty under Section 11AC.
- Appeal of Appellant 1 be allowed.

3.3 Arguing for the Appellant 3 and Appellant 4, learned counsel submits:

- The order sanctioning the refunds to the appellant 1 has not been reviewed/ challenged by the revenue before appropriate appellate authority. In absence of any such challenge the proceedings initiated against the Appellant 1 and on Appellant 3 and 4 are bad in law.
- Appellant 3 & 4 understand that the entire amount due to the taxi owners have been refunded by the Appellant 1. In absence of any erroneous refund claimed by the Appellant 1, there is no question of aiding and abetting erroneous sanction of refund.
- Appellants have suffered huge losses due to non receipt of the amounts to be refunded from PAL.
- Ingredients for imposition of penalty under rule 209A are absent in the present case and hence penalty imposed under the said section cannot be justified as have been held by the larger bench of tribunal in the case of Steel tubes of India Ltd.
- Impugned order has been passed in violation of the principles of natural justice.
- Interestingly by the order dated 29.03.2007, when the amount of erroneous refund was determined as Rs 2.69 crores, the penalty imposed on appellant 3 was Rs 55,000/- which has been now by the impugned order has been increased to Rs 1,00,000/-

- The appeals filed by the appellant 3 and 4 be allowed.

3.4 Arguing for the revenue, learned authorized representative while reiterating the findings recorded in the impugned order submits that the penalty on the above dealers has been imposed as they have aided and abetted the Appellant 1 by willfully furnishing fraudulent documents so as to enable them file the refund claim. They have admitted in their statements that they had obtained dated receipt of the cheques of differential amount the taxi owners without physically handing over these cheques to the taxi owners. Photocopies of the cheques were forwarded to M/s PAL for filing the refunds. Justifying the imposition of penalties on the dealers reliance is placed on the following decisions:

- Woodmen Industries [2004 (164) 339 (T-Kol)]
- Universal Radiators Ltd. [2008 (223) ELT 0630 (T-Chennai)]

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 In the impugned order following findings are recorded:

"29. I have carefully gone through the records of the case, the Show Cause Notice and the CESTAT Order No. A/853 to 859/2007/C.I. (EB) dated 19.11.07 vide which the Hon'ble Tribunal has remanded the case for de-novo adjudication.

30. The Hon'ble CESTAT vide Order dated 19.11.07 (Supra) has remanded the case for de-novo adjudication. The relevant Para vide which the directions have been provided by the Hon'ble CESTAT is reproduced below:-

"15."

31. In terms of remand order of CESTAT, the present adjudication proceeding is restricted only to the following issues:-

- (a) Verification of the evidence produced by M/s FIL regarding payment of amount to individual taxi owners after issue of show cause notice i.e from October,2001*
- (b) If on above verification on any amount is found to have not been refunded, then the same is to be confirmed.*

- (c) Penalties, if any, required to be imposed should also be determined afresh.

A. Verification of the evidence provided by M/s FIL regarding payment of amount to individual taxi owners after issue of show cause notice i.e. from October, 2001

(i) M/S FIL during the course of personal hearing on 7.2.2011 submitted that the evidence in the form of 25 volumes of document to show that they had paid Rs. 2,91,38,720.21/- to the owner of the vehicle registered as Taxi are available for verification by the department. M/s FIL requested that the said documents may be verified by the department and they undertook to pay the balance amount of around Rs. 17 Lakh (approx) to the Government for the reason that they were not able to trace the persons in whose name the vehicles have been registered as taxi. This payment is apart from the amount already paid to PAL, for whom they had manufactured the vehicles in question.

(ii) The Deputy Commissioner vide letter F.No.V.Adj(30)Kurla/CR- 10/Commr/ 2006/ M-II/1113 dated 14/3/2011 was directed to carry out the verification of the documents produced by M/S FIL.

(iii) The Assistant Commissioner, Central Excise, Kurla Division vide letter F.No.V(Adj)Misc-Kurla/2/10/1563 dated 14/10/2011 submitted the verification report wherein it was reported that M/s FIL has produced the records/documents in the form of 25 volumes each containing 50 original receipts and Xerox copies of other supporting documents in each volume alongwith a statement of pending Taxi Refund cases as per Annexure B and C of the related SCN. On receipt of the said statements, the same was forwarded to the concerned Citibank, Fort, Mumbai-400001 and requested them to report whether the cheques given to various Taxi owners has been realized or not..The said bank submitted their confirmation of payment vide their letter ref. No. #S-110503-005426-C/SM dated 16th July, 2011 and also Email by indicating "Realized" in Col. No. 17 (Remark) in Annexure "A" except 101 instruments as they are unable to retrieve any details. The amount involved in these 101 instruments is Rs. 26,18,173.96. The documents in which

discrepancies noticed in some cases are inclusive in disputed 101 cases. As such separate discrepancy verification report in respect of verification report in respect of verified cases is not given. As regards additional cases in which amount realized but some discrepancies are noticed and in addition to 101 instruments, a separate statement showing discrepancy is enclosed as Exhibit 'B'. The amount involved in these cases is Rs. 9,47,478.73. The total disputed payment is Rs. 25,65,652.69 (Exhibit 'A' + Exhibit 'B').

(iv) The copy of the said verification report was provided to M/s FIL vide letter F.No. V/Adj(30)Kurla/CR-10/Commr/2006/M-II/Pt/1413 dated 27th Dec,2011.

(v) M/s FIL vide letter dated 7th Nov,2011 replied that with regard to Exhibit 'A' to the aforesaid report dated 24.10.2011 of Assistant Commissioner, they submitted that in all 101 cases, the bank had given certificate of realization, which they have enclosed as Annexure' A', B and C to their letter dated 4.8.2011. The said Certificates of Citibank covered the cases where pay orders and cheques were issued by them to the Taxi Owners.

In this regard, I find that the Citibank vide their letter Ref #S-110503- 005426-C/SM dated 16th July, 2011 addressed to Kurla Division had stated that they are in the process of retrieving the details of 101 instruments .M/s FIL vide letter dated 4th Aug, 2011 have provided the certificates of Citibank covering the said 101 cases. The veracity of the said certificates issued by Citibank cannot be doubted. However in certain cases it is noticed that the name of the beneficiary mentioned in Show cause Notice and that shown in the said certificates issued by Citibank are not tallying.

As per the CESTAT order dated 19.11.07 (supra) only if the amounts are actually refunded to the individual taxi owners, the conditions of notification no. 4/97 and 5/98 ought to be considered as fulfilled. Therefore, it is essential for satisfying the conditions the names of the beneficiary provided in the Show Cause Notice and the certificates are not tallying. In one case no confirmation is available from Citibank. The details are as under:-

<i>Sr. no.</i>	<i>Name of Beneficiary as per SCN</i>	<i>Name of Beneficiary as per Citi Bank</i>	<i>Amount</i>	<i>cheque no.</i>
1	Anwar Hussain Abdulla	Haridya S Shukla	29694.60	362433
2	Ramraj Prajapati M	Kalpana Ramraj Prajapati	25381.35	362560
3	Nazeer Iqbaluddin khan	MIR Ali	25381.35	363290
4	Ramkhilawan S Yadav	Anilkumar S Yadav	25381.35	362555
5	I N Sharma	Smt. Ratnadevi	25381.35	362417
6	Khaja Sarfoo	N Nisa	25381.	362418
7	Mohd Sadique	Mahd S K Papamiya	25381.35	362492
8	Rajendra S Chourasiya	Champadevi R Chourasiya	25381.35	24
9	Mohd Zahir Khan	M M Zahir	26720.64	64
10	Gulshan M Ali	J G Hasan	26720.64	23
11	Janardhan D Mayekar		25381.35	No confirmation available from Citibank
	<i>Total duty</i>		286186.33	

As regards Exhibit 'B' of the report of the Assistant Commissioner, M/s FIL submitted there is no dispute that the amount realized by the Taxi Owners. I find that the discrepancies pointed out are as follows:-

- (i) The taxi registration no. not tallied with receipt and taxi union letter
- (ii) Payment date prior to the cheque date
- (iii) Payment date not tallied
- (iv) Engine No. not tallied with registration no.

I find that the discrepancy on account of reasons mentioned at sr. no. (i) to (iii) could be on account of typographical error. The discrepancy on account of Engine No. not tallied with registration no, since the registration of a vehicle as a taxi is identifiable with the Engine No. Therefore, the demand on this count is confirmable, which as per Annexure 'B' to the verification report of the Assistant Commissioner works out to Rs.1,57,321/-

M/s FIL have submitted vide their letter dated 4/8/11 that an amount of Rs.16,44,883.93 was not paid to the owners of the vehicles involved in Annexure B to the show cause notice dated 14.3.2001 since they were not able to trace the taxi owners.

In view of the above the demand works out to as follows:-

<i>Amount not paid to owners of vehicle.</i>	<i>Rs.16,44,884/-</i>
<i>Demand due to non tallying of names in cheque and non confirmation from Citibank</i>	<i>Rs. 2,86,186/-</i>
<i>Engine No not tallied with registration no.</i>	<i>Rs 1,57,321/-</i>
<i>Total</i>	<i>Rs 20,88,391/-</i>

vi. M/s FIL has submitted that In respect of Annexure C to the show cause notice they had already refunded an amount Rs.15,92,889.50 (Rs. 17,81,001.62 (amount of refund sought to be denied in SCN)-Rs. 1,88,112.12 (amount not refunded to Taxi Owners)). M/s FIL have requested to adjust the said amount sought to be demanded. This submission of the assessee cannot be accepted in as much as duty is demanded under Section 11A of Central Excise Act, 1944 and refund is governed Section 11B of Central Excise Act, 1944. Further the powers of sanction of refund lies with the Assistant/Deputy Commissioner having jurisdiction over the unit as per Section. 11B ibid. Therefore, M/s FIL is required to file refund claim with jurisdictional Assistant/Deputy Commissioner.

vii. As regards penalty I find that neither the dealers nor M/s PAL is responsible for fraudulent claim of refund in these cases. The actions of M/S FIL in claiming fraudulent refund claim by misdeclaration satisfies the necessary ingredients to impose penalty under Section 11AC of Central Excise Act, 1944, Therefore, They are liable for penalty under Section 11AC of the Central Excise Act, 1944 in the amount sought to be confirmed.

viii. As this case has been decided as per the directions of Tribunal. On reexamination, it is found that the duty erroneously refunded works out to Rs. 20,88,391/- as against the duty demanded and confirmed by my predecessor which is Rs.2,68,38,851/-. Accordingly the penalties are proposed to be

imposed on all the co-noticees commensurating with amount of demand confirmed. In respect of refunds claimed, the dealers were party to the submission of cheques for claiming refund against vehicles, which they knew that the said amounts was not passed on to the persons in whose name these vehicles were registered. Those cheques were forwarded to M/S FIL by M/s PAL. M/s PAL also knew that, though they were forwarding cheques as an evidence for having paid the amount to ultimate buyers, in fact such amount was not paid to the buyers. This is because of simple fact that they had not refunded the amount to the dealers. They can't deny that they had dealt with the goods as M/s PAL was the buyer of the cars and others were dealers. The liability of such cars for confiscation also could not be denied as there is a violation of erstwhile Rule 9(2) of the Central Excise Rules, 1944. Therefore M/s PAL as well as dealers except M/s Jay V.jay Motors was liable for penalty under Rule 209A of the erstwhile Central Excise Rules, 1944. However, their liability will be restricted to the amount of refund claimed by presenting fraudulent documents in the form of cheques which were not credited to the ultimate buyers."

4.3 From the facts of case as referred in the impugned order it is quite evident that we are in the third round of litigation now. Matter has been remanded back to the original authority for re-determination and verification of the documents, submitted by the appellant 1, claiming that they have refunded the entire amount to individual taxi owners, which has been claimed by them as refund in terms of Notification No 4/97-CE and 5/98-CE. In terms of these notifications in respect of the motor cars cleared from the factory of the manufacturer, the partial refund of duty was given in respect of the duty paid at the time of clearance of the said motor cars, if they were subsequently registered as taxi, subject to the fulfillment of the conditions as specified in the said notifications. Condition 34 of Notification 4/97-CE and 43 of Notification No 5/98-CE are reproduced below:

"Notification No 4/97-CE dated 01.03.1997

34. If, -

(a) the manufacturer at the time of clearance of motor vehicle mentioned against S. No. 195 in column (3) of the said Table (hereinafter in this condition referred to as the said motor vehicle) has paid excise duty calculated at the rate of 40% ad valorem;

(b) the manufacturer furnishes to the Assistant Commissioner of Central Excise a certificate from an officer authorised by the concerned State Transport Authority, to the effect that the said motor vehicle has been registered for use solely as a taxi or ambulance, as the case may be, within three months of the clearance of the said motor vehicle from the factory of manufacture or such extended period as the said Assistant Commissioner may allow;

(c) the manufacturer had not collected from the person, group of persons, any body or organisation, as the case may be, in whose name the said motor vehicle has been registered as a taxi or ambulance, as the case may be, or in case had collected, has refunded to such person, group of persons, any body or organisation, the amount equivalent of such exemption of duty;

(d) the exemption in case of ambulance is only applicable for registered hospitals, nursing homes and sanitoriums and such other organisations as the Central Government may notify, in this behalf, in the Official Gazette; and

(e) the manufacturer files a claim for refund of duty paid in excess of that specified against S. No. 195 in column (4) of the said Table, in terms of section 11B of the Central Excise Act, 1944 (1 of 1944)."

Notification No 5/98-CE dated 02.06.1998

43. *(a) The manufacturer pays excise duty at the rate of 30% ad valorem in the case of motor vehicle falling under sub-heading No. 8702.10 and 40% ad valorem in the case of motor vehicle falling under sub-heading No. 8703.90, as the case may be, at the time of clearance of the vehicle;*

(b) The manufacturer files the claim for refund of duty paid in excess of that specified under this exemption, in the proforma prescribed under rule 173S of the Central Excise Rules, 1944, with the jurisdictional Assistant Commissioner of Central Excise,

before the expiry of six months from the date of payment of duty on the said motor vehicle;

(c) The manufacturer furnishes to the said Assistant Commissioner, a certificate from an officer authorised by the concerned State Transport Authority, to the effect that the said motor vehicle has been registered for use solely as ambulance or taxi, as the case may be, within three months, or such extended period not exceeding a further period of three months as the said Assistant Commissioner may allow, from the date of clearance of the said motor vehicle from the factory of the manufacturer;

(d) Where the manufacturer has collected an amount, as representing the duty of excise, in excess of the excise duty payable under this exemption from the buyer, on receipt of a communication from the Assistant Commissioner that claim is otherwise eligible for sanction, the manufacturer shall return the excess amount so collected and submit evidence to the said Assistant Commissioner to the effect that the said amount has been duly returned to the buyer; and

(e) In the case of ambulance, the concessional rate of duty shall apply only to the hospitals, nursing homes or sanatoriums, run by either the Central Government or a State Government or a Union Territory Administration or a local authority, or are registered as such with any Department of the Central Government, State Government or a Union Territory Administration or a local authority."

4.5 In the case of the appellant the notifications were considered by the tribunal twice. In first round of litigation, interpreting the said conditions tribunal has vide the order No A/466 to 504/WZB/05/C-II dated 27.10.2004/ 17.06.2005 observed as follows:

"1.10 Since the issue revolves around the interpretation and procedure of 'Taxi Registration Refunds' under the excise notifications, all these appeals are being disposed by this common order.

2.1. Comparison of the conditions under which the procedure was prescribed for the duty adjustment after clearance and

Registration as Taxi or Ambulance vide notification 4/97 and 5/98 dt 1.6.98 indicate that-

- i) Duty on clearance of such Motor Vehicles was required to be made on Tariff Rates as applicable.*
- ii) Subsequent to such clearances, on Registration of the Motor Vehicles, as a Taxi by a person, within the lime prescribed or as extended was required to be produced by the manufacturer.*
- iii) The claim for Refund of the difference between the Tariff Rate of duty as paid on clearance and the rate notification on Registration of a Taxi was to be made by the manufacturer along with evidence of having paid such person, in whose name the Taxi was registered, the differential amount as per notification 4/97. No specific form for claim of Refund was prescribed in the notification.*
- iv) Vide notification 5/98, the claim was to be made by the manufacturer in form 'R' prescribed under rule 173S of Central Excise Rules 1944 along with evidence of registration of the Motor Vehicle as Taxi by any person and of having effected "Return" of the excess amount to the buyer of the manufacturer.*

The noticeable amendment, vide notification 5/98 dt 1.6.98 which eliminated the production of evidence of the excess amount having been refunded to the actual person in whose name the motor vehicle was registered as a Taxi and the requirement of only having made a 'return' to the buyer of the manufacturer cannot be ignored.

In the case before us, there is proof of "Return" of the excess amounts to the buyers of Fiat L.e. PAL. The material of production of photocopies of cheques made out in the name of the ultimate buyer i.e. Taxi owner registration holder and the subsequent enquiries of such amounts not being actually transferred / paid by the dealers down the chain to the Taxi registration holder from PAL are not relevant to determine the eligibility to the notification 5/98. That would be only relevant for the clearances made under notification 4/97.

2.3 Notification 5/98 relates to the Refund application to be filed under rule 1735. This proforma 'R' & as prescribed therein, an onus cast on the Assistant Commissioner to verify the claim and sanction the same. The material of having produced photocopies of cheques made out in name of persons other than the buyer of Fiat would be not relevant documents or material to determine the claim under notification 5/98 dt 1.6.98, the reliance arrived at by the lower authorities in both these cases on irrelevant material therefore cannot be approved for clearances effected by fiat on and after 1/6/98.

2.4 The orders of recovery of erroneous sanction and recovery of these refunds and penalties and duty recoveries have to be redetermined in view of the requirement of the notifications as per the relevant period of clearance of the vehicle keeping in mind that, if there were no liability to "return" the excess amounts to any other person, then the buyer of the manufacturer, then there can be no penalty on such persons or others, for having produced or not produced photocopies of the cheques which are encashed or not encashed. Material not relevant or and required for establishing a claim under the Central Excise Law cannot be a reason for calling for penalty even if such material is found to be indicating taunt on subsequent enquiries. The persons who got / or did not get the return of amounts have a recourse to law to enforce their rights, it cannot be cause for penalty under the Central Excise Act.

2.5 In view of the findings, the orders are set aside and appeals allowed for denovo adjudication by determining the demands/ recovery of erroneous refunds as per findings herein above.

3.1 All appeals allowed as Remand in above terms."

Thus by the order dated 27.10.2004/17.06.2005, tribunal has specifically held that in terms of the condition prescribed by the notification 5/98-CE, the only requirement that was to be fulfilled in respect of the said notification was to show that the manufacturer had refunded the excess amount collected and claimed as refund to their buyer i.e. their dealer. However vide order dated 19.11.2007, Tribunal while remanding the matter back to original authority has observed as follows:

"15. We have considered the submissions. We find that the appellants have taken a positive plea that in addition to return of the amount of PAL, they have returned the amount sanctioned as refund to them to the individual taxi owners by contacting the Mumbai Taximen Union who confirmed the name of the persons who purchased the Premier Padmini model motor cars., the registration number, dealer from whom the vehicle was purchased, engine number, chassis number, driving licence, evidence of purchaser etc. Once the amount has been actually refunded to the individual taxi owners, the conditions of notification no. 4/97 and 5/98 ought to be considered and accordingly the demand cannot stand. However, since there is no verification carried out by the Commissioner, the matter is remanded back to the Commissioner with direction that the evidence regarding payment of amount to the individual taxi owners after issue of show cause notice i.e. after October, 2001 onwards should be verified by the department and if the same is found to be correct, it should be considered as fulfillment of the conditions of notification 4/97 and 5/98 and such amount which on verification is found to have been refunded back, cannot be demanded .The demand should therefore be re-determined and the appellants to produce additional evidence in respect of any amount refunded in addition to Rs. 2,91,38,720.21 stated to have been already refunded. If on verification some amount is found to have been refunded, the same can be demanded. Penalties, if any, required to be imposed should not be determined afresh."

Commissioner has in the impugned order, interpreted the remand order dated 19.11.2007 in total ignorance of the order dated 27.10.2004/ 17.06.2005, and has sought to deny the amounts claim as refund under the notification 5/98-CE, on the ground that in respect of these claims appellant had failed to establish that the amount were refunded actually to individual taxi owners. The said approach of the commissioner cannot be justified. By the order dated 19.11.2007 tribunal could not have over-ruled the earlier order passed by the coordinate bench on the interpretation of the said notifications in the same case. Admittedly the order dated 27.10.2004/ 17.06.2005 was not

challenged by the revenue before any appellate authority and had thus acquired finality. Appellant have submitted before the Commissioner the details of the refund claims filed by them in terms of the notification 5/98-CE. The said details were produced before us which are reproduced below:

The refund claims filed by the appellant in terms of the Notification 5/98-CE have been correctly allowed by the jurisdictional Assistant/ deputy Commissioners in terms of the order of the tribunal dated 27.10.2004/ 17.06.2005 and demands in respect of these refund claims to the extent indicated above needs to be set aside.

Sr. No	Name of the party	Engine Number	Claim Details		
			Claim Number	Claim Date	Claim Amount
1	2	3	4	5	6
1	AshokS Bilose	52188	14	28.04.1998	25381.35
2	Sheikh Mo Yusuf Abdulla	50919	15	28.04.1999	28664.55
3	Shankar Bhiku Jadhav	52341	21	05.05.1999	26100.90
4	Shamsuddin MUmar	52275	23	05.05.1999	25050.60
5	Romraj SPal	52435	47	16.06.1999	26720.64
6	Triloknath Sukhai Vishwakarma	52459	57	20.08.1999	26720.64
7	Limbadi Ashok Gojullu	52468	62	04.09.1999	26720.64
8	Abdul Sattar Sheikh	50657	113	09.11.1998	26157.60
9	Shaikh Kamal Maqdoom	51039	115	09.11.1998	24630.45
10	Annasaheb Dahifale	51170	142	14.12.1998	25381.35
11	Haroon S Taya	51525	145	18.12.1998	25381.35
12	Limbaji Satpute	3053	147	16.10.1998	29694.60
13	Rajendrapras a dHGupta	51244	148	18.12.1998	25381.35

14	Kamruddin Md Idris	50993	156	18.12.1998	24630.45
15	Raju Dinkar Shinde	51371	157	18.12.1998	25381.35
16	AbdulR Shaukat Puleel	51015	167	11.01.1999	28664.55
17	Avinash Raut	51665	175	14.01.1999	27102.60
18	Shrirang Tukaram B	52023	189	23.02.1999	25381.35
19	RumyDara b Sidhwa	51957	190	23.02.1999	25381.35
20	Shrinath B Tiwari	3178	206	10.03.1999	29694.60
21	Chandraka nt G Padale	51951	257	23.02.1999	25381.35
22	Chandraka nt B Raut	52036	262	10.03.1999	25381.35
23	KK Nimbalkar	50064	75	24.07.1998	27854.55
24	Chandra Shekkar Pillai	51704	163	04.01.1999	25381.35
25	Tufail Ahmed Bakshish Ali	51603	163	04.01.1999	25381.35
26	Santosh Petkar	50636	83	03.08.1999	26157.70
27	RA Devendra	51681	135	14.12,1998	27102.60
28	Anant Mane	50641	83	03.08.1999	26157.60
29	Stanley P. Bangera	51699	8	28.04.1999	28965.60
30	Muktar Ahmed	52271	200	10.03.1999	25050.60
31	Nizamuddi N Ali	51855	197	23.02.1999	27102.60
32	Ramshank ar AD	52405	43	08.06.1999	27360.00
33	Mohd Anis Abdul Rauf	43497	50	10.06.1998	23744.85
34	Wahid Ali	51939	186	27.01.1999	25381.35
35	Chandraka nt Kisan Ghorpade	52040	3	28.04.1999	25381.35

36	KailasrG Khange	3204	3	28.04.1999	27750.. 60
37	GobaiRam A Patel	52209	28	10.05.1999	26100.90
38	Appasaheb Bhiku Tankar	52340	28	10.05.1999	26100.90
39	Sayed Mehboob Hasan	50974	131	01.12.1998	27854.55
40	Majbool Hussain Tejmal	3160	168	14.01.1999	29694.60
41	Jainath Tiwari	51411	184	27.01.1999	25381.35
42	Mulchand B. Mali	3211	33	18.05.1999	27750.00
43	Shaikh A Kadi	52326	36	27.05.1999	25050.60
44	Shaikh Abdul Aziz A Kadir	1619	1	29.07.2000	26873.28
45	Mohd.Amil Afzal Ahmed	1634	1	29.07.2000	26873.28
46	Aslam.M Thakkar	51764	170	14.01.1999	25381.35
47	DiwakarD Singh	3202	6	28.04.1999	27750.60
48	Shamim Ahmed	51538	-160	28.12.1999	25381.35
49	Rajesh Singh	51508	162	04.01.1999	25381.35
50	Nizamuddi n KAmed	51648	161	04.01.1999	25381.35
51	Jarman Singh	51564	134	01.12.1998	25381.35
52	Mohd Isreal	51159	126	12.11.1998	25381.35
53	Shaikh Mustafa	51389	125	12.11.1998	25381.35
54	Rajkumar Udharan	50626	82	03.08.1998	27854.60
55	Kishor Yeotikar	51782	203	10.03.1999	28664.55
56	R. B. Dete	51725	164	04.01.1999	28965.60

57	PA Kulkarni	50279	60	26.06.1998	27854.55
58	B.S. Magar	50543	66	06.07.1998	27854.55
59	R.A. Phutane	51284	164	04.01.1999	28664.55
Total					1564714.98

4.6 In respect of the three refund claims for the amount Rs. 80,169.75/- which were filed in terms of the Notification No 4/97-CE for which the appellants have not been able to file the proof of refund to the individual taxi owners as required in terms of the said notification, the refund claim would not be admissible to the appellant in terms of the interpretation placed by the tribunal in earlier orders. Details of the said refund claims are reproduced below:

S No	Name of the party	Engine No	Claim details		
			Number	Date	Amount
1	P.T. Dhere	43519	12	15.04.1999	26157.60
2	N S Patil	43493	4	10.04.1999	26157.60
3	Dinesh Ghadge	42989	43	12.05.1999	27854.55
	Total				80169.75

4.7 In respect of the demand of amount of Rs 2,86,186.39/- in respect of the refund of claims filed in case of 11 taxi owners appellants have produced the evidence in respect of the payment of the refund claim to the individual taxi owner or their legal heirs the details as produced are reproduced below:

S. No.	Name of Beneficiary as per SCN	Name of Beneficiary as per CitiBank	Amount	Cheque No.	Remark Refer Appeal
1	2	3	4	5	6
1	Anwar Husain Abdulla	Haridya Shukla	29,694.60	362433	*Pg. No. 607 to 617 of the Appeal
2	Nazeer Iqbaluddin Khan	Mir Ali	25,381.35	363290	**Pg. No. 631 to 658 of the Appeal.
3	Janarden D Mayekar		25,381.35	362549	***Pg No 741 to 751 of

					the Appeal
4	Ramraj Prajapati M	Kalpana Ramraj Prajapati	25,381.35	362560	****Pg. No. 618 to 630 of the Appeal
5	Ramkhilavan S Yadav	Anilkumar S Yadav	25,381.35	362555	****Pg. No. 659 to 673 of the Appeal.
6	I.N. Sharma	Smt. Ratnadevi Oshwardas Sharma	25,381.35	362417	****Pg. No. 674 to 683 of the Appeal.
7	Khaja Sarfoo	N. Nisa	25,381.00	362418	****Pg. No. 684 to 687 of the Appeal.
8	Mohd Sadique	Mahd S K Papamiya	25,381.35	362492	****Pg. No. 688 to 691 of the Appeal.
9	Rajendra H Chourasiya	Champadevi R Chourasiya	25,381.35	000024	****Pg. No. 692 to 707 of the Appeal.
10	Mohd Zahir Khan	M M Zahir	26,720.64	000064	****Pg. No. 708 to 717 of the Appeal.
22	Gulhasan M Ali	JG Hasan	26,720.64	000023	****Pg. No. 718 to 740 of the Appeal.
			286186.33		

*Typing error in the order issued. Correct Ch. No. 362437 issued to beneficiary (i.e., Anwar Husain Abdulla) Copy of Bank Certificate attached for the same.

**Ch. No. 363290 issued to Mir Ali Ch. No. 363190 issued to Nazeer I. Khan correct name of beneficiary shown by Citibank.

***Bank has not given beneficiary name in the certificate

****Amount refunded to Legal Heir as per Affidavit.

During the course of hearing and taking note of the fact that the this is third round of litigation in respect of the proceedings

initiated vide SCN of 2001, the said document were taken up for sample verification by us and having satisfied ourselves that the these documents fulfill the conditions of the refund to the individual taxi owner we set aside the demand made in respect of these claims.

4.8 In respect of the claims as detailed below the demand against the erroneous refund has sought to been recovered for the reason minor mismatches in the Engine No as reflected in the Show Cause Notice and the one indicated in the RC Book.

Sr. No.	Dealer's Name	Eng No.	Order Date	Amount	Engine No. as per RC Book	Remarks
1	2	3	4	5	6	7
1	M/s Bombay Cycle & Motor Agency Ltd	52091	10.04.00	25381.35	52091	*Ref. Pg No. 752 to 757
2		52056	27.09.99	25381.35	52026	**Pg No. 758 to 763
3		52294	29.08.00	26100.90	52234	***Pg. No. 63 & 103 of SCN & for Documents No. 785 to 790
4	M/s Credit Line Motors Ltd.	51831	06.12.00	25381.35	51837	**Pg. No. 764 to 770
5		52151		25381.00	52051	***Pg. No. 91 & 94 of SCN & for Documents Pg. No. 778 to 784
6	M/s Shaman Automobiles	3143	06.12.00	29694.60	3148	***Pg. No. 80 & 95 of SCN & for Documents Pg. No. 772 to 777
Total					157320.55	

*Matched

**Typographical Error of a single digit

***Engine **No.** appeared twice in the SCN

We verified the documents as reflected in the remarks column above and having satisfied ourselves that the mismatches as stated are very minor in nature. Further we also note that there are errors in recording the engine number in the show cause notice whereby same engine number appeared twice in the show cause notice which is practically impossible. The verification as undertaken in these cases cannot be reason for denial and the verification has to be caused by referring to all other details.

Having satisfied with correctness of these claims we hold that demand made in respect of these claims needs to be set aside.

4.9 On the basis of the sample verification of the documents produced as indicated in the previous paragraphs and on the basis of the decisions of the tribunal in the present case in earlier two rounds of litigation we are of the view that demand at the most can be upheld only to the extent of three claims indicated in para 4.6 above i.e. to the extent of Rs 80,169.75. However we also take note of the fact and the submission made by the counsel for the appellants, that none of the refund orders made against the refund claim filed by the appellant revenue has sought to challenge the said orders by way of filling the appeal before the Commissioner (Appeals). It is settled law that the refund orders made in terms of the Section 11B of the Central Excise Act, 1944 are judicially determined, the same needs to be set aside in the manner as provided in law. Having not filed any appeal against the said refund orders those order had acquired finality and could not have been challenged by way of the proceedings initiated under Section 11A.

4.10 In the case of Eveready Industries India Ltd., [2016 (337) ELT 189 (Mad)] Hon'ble Madras High Court has held as follows:

"28. But, a careful look at the scheme of Sections 11A, 11B and 35E would show that an application for refund is not to be dealt with merely as a ministerial act or an administrative act. Under Section 11B of the Act, a person, claiming refund of any duty of excise and interest already paid, should make an application in the prescribed form. Such application is to be made within the period of limitation prescribed under sub-section (1) of Section 11B. The application should be accompanied by such documentary or other evidence, in relation to which, such refund is claimed. Sub-section (2) of Section 11B mandates that upon receipt of any application for refund, the Assistant Commissioner or Deputy Commissioner, if he is satisfied that the duty is refundable, should make an order. The refund order is capable of being given effect to in several methods including adjustment or rebate of duty of excise, all of which are prescribed in Clauses (a) to (f) under the Proviso to sub-section (2) of Section 11B.

29. Sub-section (3) of Section 11B, which contains a non obstante clause, makes it clear that de hors any judgment, decree, order or direction of the Appellate Tribunal or any Court or any other provisions of the Act, no refund shall be made except as provided by sub-section (2).

30. Therefore, the detailed procedure prescribed under Section 11B not only regulates the manner and form, in which, an application for refund is to be made, but also prescribes a period of limitation, method of adjudication as well as the manner, in which, such refund is to be made. In simple terms, Section 11B is a complete code in itself.

31. Therefore, it is clear that what is required of an Assistant Commissioner or Deputy Commissioner under sub-section (2) of Section 11B is to adjudicate upon the claim for refund. The expression 'Adjudicating Authority' is also defined in Section 2(a) to mean any authority competent to pass any order or decision under this Act, but does not include the Central Board, Commissioner of Excise (Appeals) or the Appellate Tribunal. Hence, the power exercised under Section 11B is that of an adjudicating authority and the order passed is certainly one of adjudication.

32. It is only when an order of adjudication is passed under Section 11B that a person, who makes a claim for refund, will get his money back. This assumes significance in the light of the fact that by the proceedings dated 29-9-1998, the appellant/assessee was informed of the sanction granted by the Assistant Commissioner to make a refund of a sum of Rs. 3,31,365/- arising as a consequence of the finalisation of assessment.

33. In simple terms, the refund that the appellant got was and should have been only after an adjudication under Section 11B and not without an adjudication. It must be pointed out that if an authority has done something, it must be presumed that he has done it in accordance with law. Therefore, we would give the benefit of doubt to the Assistant Commissioner and presume that before according sanction in September, 1998 for refund, he had actually followed the procedure under Section 11B and passed an order of adjudication.

34. Once it is seen that an order of adjudication has been validly passed under Section 11B and a refund has also been made on 29-9-1998, then the next question that would fall for consideration is as to whether Section 11A can be invoked thereafter. We have already extracted the provisions of Section 11A. Interestingly, the authority, given under Section 11A(1) for recovery of any refund erroneously paid, is upon the Central Excise Officer. The expression used in Clause (a) in sub-section (1) of Section 11A is 'Central Excise Officer'.

35. The expression 'Central Excise Officer' is defined in Section 2(b) to mean the Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of a Central Excise Officer under this Act.

36. Therefore, an order of recovery can be passed under Section 11A even by an Assistant Commissioner, as he happens to be a Central Excise Officer in terms of Clause (a) in sub-section (1) of Section 11A. In contrast, the processing of an application and the passing of an order on an application for a refund, can be made either by the Assistant Commissioner or by the Deputy Commissioner under sub-section (2) of Section 11B. Hypothetically, it would mean that a Deputy Commissioner can pass an order for refund under Section 11B(2) and an Assistant Commissioner can invoke the proceedings for recovery under Section 11A(1).

37. In other words, by reading the provisions of Section 11A in such a manner as the learned standing counsel would request us to do, we would be recognizing a power in a Subordinate Authority to invoke the power of recovery under Section 11A, despite the fact that a refund application has been adjudicated upon by a Superior Authority under Section 11B. We should keep

this fact in mind before dealing with the interplay between Sections 11A and 35E.

38. As we have seen from the language employed in Section 35E, which we have extracted above, a limited revisional jurisdiction is conferred upon the Principal Commissioner and Commissioner of Excise in sub-section (2) of Section 35E. This power is not actually to correct any error directly, on the part of an adjudicating authority. This power is available only for directing the Competent Authority to take the matter to the Commissioner (Appeals).

39. Therefore, it was always open to the Principal Commissioner or the Commissioner of Central Excise to examine the order of the adjudicating authority namely the Assistant Commissioner in the proceedings under Section 11B and to give a direction to the Competent Authority to file an appeal against the order of refund under Section 11B, to the Commissioner of Appeals under Section 35. This was not done in this case. On the contrary, the authorities allowed the order to be passed in Appeal No. 206/98, dated 30-11-1998 on the basis of the refund already made.

40. Now, coming to the decisions, on which, heavy reliance is placed by the learned standing counsel for the Department, it is seen from the decision of the Supreme Court in Jain Shudh Vanaspathi Ltd., that the whole proceedings were held by the Supreme Court to be vitiated by fraud. The decision of the Supreme Court in Jain Shudh Vanaspathi Ltd., will not go to the rescue of the Department in view of the fact that there was a clear finding that the assessee got the goods cleared for home consumption under Section 47 of the Customs Act by playing a fraud upon the Department. Therefore, when an objection was taken that after clearance under Section 47, the provisions of Section 124 cannot be invoked, the Supreme Court pointed out that fraud vitiates all solemn acts. That is not the type of case that we are dealing here.

41. Insofar as the decision of the Full Bench of the Tribunal in Asian Paints (India) Limited is concerned, the difficulty faced by the Tribunal was the different periods of limitation prescribed under Sections 11A and 35E. The case before the Full Bench of

the Tribunal in Asian Paints (India) Limited was on the reverse. As seen from Paragraph 1 of the decision of the Full Bench, the only issue referred for the consideration of the Larger Bench revolved around the limitation prescribed in Section 35E(3) and Section 11A. We are not dealing with a case where there is a logjam between two different provisions. Therefore, the said decision, which was also confirmed by the Supreme Court in Asian Paints (India) Limited [2002 (142) E.L.T. 522], cannot be of any application.

42. No one can have a quarrel with the proposition that Sections 35E and 11A operate in different fields and are invoked for different purposes. We are merely concerned in this case with the interplay between Sections 11A and 35E. We are also concerned with what happened in the form of an adjudication under Section 11B. What happens in a case where an adjudication takes place under Section 11B did not at all fall for consideration in Asian Paints (India) Limited.

43. The decision of this Court in Sivanandha Pipe Fittings Ltd., was also on the point as to whether it is open to the authorities to take recourse to one remedy where several remedies are available. It is not the contention in this case that there are plural remedies available to the Department. The contention in this case is as to whether, after having allowed an adjudication under Section 11B to attain finality, there was any remedy open to the Department at all under Section 11A. Therefore, the decision in Sivanandha Pipe Fittings Ltd., is also of no assistance to the Department.

44. Insofar as the decision of the Jharkhand High Court in Gillooram Gaurishankar is concerned, the question that was referred to the High Court was whether the statutory remedies under Section 11A(1) will have to be exercised, to the exclusion of the remedies available under Section 35E(2) or not. In Paragraph 4 of the decision, the Jharkhand High Court rightly held that there was no necessity to issue a show cause notice under Section 11A, when recourse has already been taken to Section 35E.

45. Insofar as the decision of this Court in PRICOL Ltd., is concerned, one of the two questions of law referred was as to

whether the amount erroneously refunded could not be recovered by filing an appeal under Section 35E without issuing a demand notice under Section 11A. That is not the situation in this case.

46. In this case, an order of refund was passed on an application under Section 11B. The appeal against the finalisation of the assessment was closed on the basis of the refund order. There can be no doubt about the fact that the statutory right of appeal is a valuable right conferred upon the assessee. That right was actually altered on the basis of an order of refund. Suppose there had been no order of refund, the appeal could have been pursued against the finalisation of the assessment.

47. In other words, two valuable rights, one in the form of right of appeal and another in the form of order of refund, are now sought to be taken away indirectly by taking recourse to Section 11A. What cannot be done directly cannot be done indirectly also.

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

49. In Madurai Power Corporation, this Court had an occasion to consider the interplay of Sections 11A and 35E of the Act. In the said case, show cause notices issued to the Corporation as to why excise duty payable on low sulphur heavy stock and furnace oil should not be demanded, came to be challenged. The show cause notices were issued under Section 11A of the Act. Reliance was placed by the assessee upon the orders passed by the adjudicating authority under the Rules of the year 2001 and it

was contended that such an order could be rectified only through an appeal mechanism prescribed under Section 35E(2). As seen from Paragraph 11 of the decision, the contention of the assessee was that Section 11A does not contain a non obstante clause and that therefore, it cannot be invoked to nullify the appeal remedy available to the Department under Section 35E(2).

50. The very same argument now advanced by the Department to the effect that Sections 11A and 35E operate in two different independent fields was raised by them. After considering the issue elaborately and also after taking note of the decision in Asian Paints (India) Limited approved by the Supreme Court, this Court came to the conclusion in Paragraph 23 as follows :

"In our opinion, there is no nexus between Section 11A and Section 35E. Section 11A does not indicate that the legislature intended to override Section 35E. Both sections have to be read harmoniously. In the present case, Annexure-I certificate has been issued in favour of the petitioners from time-to-time on executing B-8 security bond and on furnishing a bank guarantee. The Department has to follow the procedure under Section 35E for setting aside the Annexure-I certificate. Unless, the Annexure-I certificate is cancelled or rejected by the Competent Authority, by following the procedure under Section 35E, it is not permissible for the respondents to invoke Section 11A of the Act. Therefore, we are of the considered opinion that the issuance of show cause notices is without jurisdiction and is liable to be struck down."

51. We are of the considered view that the paragraph extracted above is a complete answer to the question of law now raised. Unfortunately, in none of the decisions relied upon by the learned standing counsel, the Courts were confronted with an order of adjudication passed under Section 11B on an application. Once an application for refund is allowed under Section 11B, the expression 'erroneous refund' appearing in sub-section (1) of Section 11A cannot be applied. If an order of refund is passed after adjudication, the amount refunded will not fall under the category of erroneous refund so as to enable the order of refund to be revoked under Section 11A(1). One

authority cannot be allowed to say in a collateral proceeding that what was done by another authority was an erroneous thing. Therefore, the question of law has to be answered in favour of the appellant/assessee and the appeal deserves to be allowed."

4.11 In case of Honda Siel Power Products [2020 (372) E.L.T. 30 (All.)], Hon'ble Allahabad High Court has observed as follows:

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

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

35. *Thus, Section 11B assumes great significance, as any order of refund of excise duty and interest is made only after the adjudication as envisaged under scheme of Section 11B. In the present case, petitioner-company had made an application for refund which was adjudicated on 5-11-2015 and it was directed to refund excise duty to tune of Rs. 1,02,75,633/- which was in excess. This order was never challenged by revenue in appeal and it attained finality.*

36. Thus, once the order of adjudication has been validly passed under Section 11B and a refund has been made on 5-11-2015, the next question which crops up for consideration is as to whether Section 11A can be invoked thereafter.

37. As Section 11A(1)(a) uses the word "Central Excise Officer" who is empowered for recovery of any refund, Central Excise Officer is defined in Section 2(b) of the Act, to mean Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise or any other officer of Central Excise Department invested by Central Board of Excise and Customs constituted under Central Board of Revenue Act, 1963 with any of powers of a Central Excise Officer under the Act. Thus, an order of recovery can be passed under Section 11A by an Assistant Commissioner, as he happens to be a Central Excise Officer in terms of Clause (a) of sub-section (1) of Section 11A, though an application under sub-section (2) of Section 11B can be made and an order for refund can either be passed by Assistant Commissioner or by Deputy Commissioner. Meaning thereby that a Deputy Commissioner can pass an order for refund under Section 11B(2) and an Assistant Commissioner can invoke proceedings for recovery under Section 11A(1).

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

39. Through plain reading of Section 35E, it is clear that limited revisional jurisdiction is conferred upon Principal Commissioner and Commissioner of Excise in sub-section (2) of Section 35E, this power is not actually to correct any error directly, but only available for directing the competent authority to take matter to the Commissioner (Appeals). Meaning thereby that it is always open to Principal Commissioner or Commissioner or Central Excise to examine the order passed by adjudicating authority under Section 11B and direct the competent authority to file

appeal against order of refund. In the present case, order of refund was never taken to higher forum and it became final.

40. Decisions relied upon by the counsel for the revenue in case of Jain Shudh Vanaspati (supra) relates to proceedings which were vitiated by fraud. Further, the Apex Court recorded a clear finding that goods were cleared for home consumption under Section 47 of the Act, by playing fraud upon the Department. Therefore, the Court held that fraud vitiates all solemn Acts, while in present case department has not alleged any fraud upon the petitioner-assessee.

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

42. Secondly, the argument of alternative remedy under Section 35 is concerned, the said fact is of no rescue to the department as specific case of petitioner is that show cause notice dated 17-8-2017 was issued after more than two years from finalisation of assessment order dated 24-7-2015, and where there is change of opinion by issuance of show cause notice, writ petition is maintainable as held in Shahnaaz Ayurvedics (supra), Simplex Concrete Piles (supra) and Samsung India Electronics Pvt. Ltd. (supra).

43. As seen above that Section 35E and 11A operate in different fields and are invoked for different purposes, we are merely concerned in this case with the interplay between Sections 11A and 35E. We are also concerned with what happened in the form of an adjudication under Section 11B. What happens in a case wherein adjudication takes place under Section 11B and authorities do not take recourse available to them, whether after having allowed adjudication under Section 11B to attain finality, was there any remedy available to department at all under Section 11A to proceed.

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

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

4.12 Thus in our view the Show cause Notice issued to the appellant itself would be hit by the opinion expressed by the Hon'ble High Courts in the above referred decisions. Accordingly we find are not in position to uphold any part of the order, including the penalties imposed on Appellant 1.

4.13 By plain reading of the order dated 27.10.2004/ 17.06.2005 of the Tribunal we are unable to sustain the penalties imposed on the dealers of the appellant, i.e. appellant number 2, 3 and 4.

5.1 Appeals filed by the appellants are allowed.

(Order pronounced in the open court on 22.12.2022)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)