

# Show cause notice is not required for recovery where order sanctioning the refund is set aside in review - SC

30 March 2023



## Summary

The Supreme Court (SC) has allowed the Revenue's appeal and held that a show cause notice (SCN) u/s 11A of the Central Excise Act, 1944 (CEA), is not necessary for the recovery of the amount in case the refund of duty is reviewed u/s 35E of the CEA and found erroneous. The SC stated that once the order-in-original sanctioning the refund came to be set aside in a proceeding under Section 35E of the CEA and when such proceedings were initiated within the time prescribed, there is no question of any further notice under Section 11A of the CEA. Therefore, the SC has set aside the judgment of the Delhi High Court (HC) and Tribunal and restored the order passed by the Commissioner (A).

### Facts of the case

- Morarjee Gokuldas Spg. & Wvg. Co.Ltd ('appellant'), engaged in manufacturing cotton yarn, applied for refund of duty paid on the removal of captively consumed cotton yarn in its composite mills for weaving of the fabric.
- The adjudicating authority set aside the SCN and directed refund of the entire amount, stating that the duty deposited was paid under protest, and accordingly, the time limit prescribed under Section 11B of the CEA does not apply.
- The Commissioner (A) allowed the appeal filed by the Revenue under Section 35E (2) of the CEA by upholding the grounds of unjust enrichment and the time barred under Section 11B of the Act.
- Aggrieved by the decision of the Assistant Commissioner, the respondent submitted an appeal before the Tribunal, wherein the Tribunal rejected the demand raised by the Revenue on the grounds that a SCN was not issued under Section 11A of the CEA.
- The HC had further upheld the CESTAT order relying on the judgment of Bajaj Auto Ltd. that the erroneous refund cannot be recovered by merely filing an application under Section 35E (2) of the Act, unless the notice under Section 11A of the Act is issued within the stipulated time.

### Issue before SC:

Whether the notice under Section 11A of the CEA is necessary for the recovery of the amount when the refund granted is reviewed under Section 35E of the CEA, whether a separate notice under Section 11A of the CEA is to be issued within the time limit prescribed therein and before the proceedings under Section 35E of the CEA are initiated, and/or the notice under Section 11A of the CEA shall precede the proceedings under Section 35E of the CEA?

### SC observations and ruling [Civil Appeal No.3039 of 2011, judgement dated 24 March 2023]

- **No requirement of issuance of a SCN under Section 11A if proceeding already initiated under Section 35E:** Once the order-in-original sanctioning the refund came to be set aside in a proceeding under Section 35E of the CEA, there is no question of any further notice under Section 11A of the Act.
- **Error by HC:** The law laid down by this court in the case of Asian Paints (India) Ltd. (supra) as such was binding on the HC. The Revenue had pointed out the ruling of this court in the case of Asian Paints to the HC. However, despite this, the HC has ignored this ruling without giving any reasons as to how the same has been misplaced and relied on the ruling of Bajaj Auto Ltd. that was issued before the Asian Paints ruling.

- **Appeal allowed:** Therefore, the SC set aside the impugned judgment and order passed by the High Court and that of the Tribunal, and restored the order passed by the Commissioner (Appeals).

---

### Our comments

Earlier, the apex court, in the case of Asian Paints (India) Ltd., had specifically negated and/or did not accept the submission on behalf of the assessee that the recovery of excise duty cannot be made pursuant to an appeal filed invoking the provisions of Section 35E if the time limit under Section 11A has expired. It had held that Sections 11A and 35E operate in different fields and are invoked for different purposes. Therefore, different time limits are set out therein. Accepting the assessee's submission would render Section 35E virtually ineffective, which would be impermissible.

The present ruling is in line with the ruling mentioned above and has again reiterated that once the refund sanctioning order is set aside in a review proceeding that was initiated within the time prescribed, there is no requirement for further notice for recovery of the same.

---

# Contact us

To know more, please visit [www.grantthornton.in](http://www.grantthornton.in) or contact any of our offices as mentioned below:

---

## NEW DELHI

National Office,  
Outer Circle,  
L 41, Connaught Circus,  
New Delhi - 110001  
T +91 11 4278 7070

## NEW DELHI

6th Floor, Worldmark 2,  
Aerocity,  
New Delhi - 110037  
T +91 11 4952 7400

## AHMEDABAD

Unit No - 603 B, 6th Floor,  
Brigade International  
Financial Center,  
GIFT City Gandhinagar,  
Ahmedabad - 382355

## BENGALURU

5th Floor, 65/2, Block A,  
Bagmane Tridib,  
Bagmane Tech Park,  
CV Raman Nagar,  
Bengaluru - 560093  
T +91 804 243 0700

---

## CHANDIGARH

B-406A, 4th Floor,  
L&T Elante Office Building,  
Industrial Area Phase I,  
Chandigarh - 160002  
T +91 172 433 8000

## CHENNAI

9th floor, A wing, Prestige  
Polygon, 471 Anna Salai,  
Mylapore Division, Teynampet,  
Chennai - 600035  
T +91 44 4294 0000

## DEHRADUN

Suite No 2211, 2nd Floor,  
Building 2000, Michigan Avenue,  
Doon Express Business Park,  
Subhash Nagar,  
Dehradun - 248002  
T +91 135 264 6500

## GURGAON

21st Floor, DLF Square,  
Jacaranda Marg,  
DLF Phase II,  
Gurgaon - 122002  
T +91 124 462 8000

---

## HYDERABAD

Unit No - 1, 10th Floor,  
My Home Twitza, APIIC,  
Hyderabad Knowledge City,  
Hyderabad - 500081  
T +91 40 6630 8200

## KOCHI

6th Floor, Modayil Centre Point,  
Warriam Road Junction,  
MG Road  
Kochi - 682016  
T +91 484 406 4541

## KOLKATA

16th floor, Ambuja Eco-Centre,  
Plot No. 4, EM Bypass, EM Block,  
Salt-Lake Sector-V, Kolkata,  
West Bengal - 700091  
T +91 33 4444 9300

## MUMBAI

11th Floor, Tower II,  
One International Center,  
SB Marg Prabhadevi (W),  
Mumbai - 400013  
T +91 22 6626 2600

---

## MUMBAI

Kaledonia, 1st Floor,  
C Wing,  
(Opposite J&J Office),  
Sahar Road, Andheri East,  
Mumbai - 400069

## NOIDA

Plot No 19A, 2nd Floor,  
Sector - 16A,  
Noida - 201301  
T +91 120 485 5900

## PUNE

3rd Floor, Unit No 310-312,  
West Wing, Nyati Unitree,  
Nagar Road, Yerwada  
Pune - 411006  
T +91 20 6744 8800

---

For more information or for any queries, write to us at [GTBharat@in.gt.com](mailto:GTBharat@in.gt.com)



Follow us @GrantThorntonIN

© 2023 Grant Thornton Bharat LLP. All rights reserved.

"Grant Thornton Bharat" means Grant Thornton Advisory Private Limited, the sole member firm of Grant Thornton International Limited (UK) in India, and those legal entities which are its related parties as defined by the Companies Act, 2013, including Grant Thornton Bharat LLP.

Grant Thornton Bharat LLP, formerly Grant Thornton India LLP, is registered with limited liability with identity number AAA-7677 and has its registered office at L-41 Connaught Circus, New Delhi, 110001.

References to Grant Thornton are to Grant Thornton International Ltd. (Grant Thornton International) or its member firms. Grant Thornton International and the member firms are not a worldwide partnership. Services are delivered independently by the member firms.