Karnataka High Court Thungabhadra Steel Products Ltd. vs Supdt. Of Central Excise on 25 January, 1991 Equivalent citations: 1991 (33) ECC 140, 1992 ECR 87 Karnataka, 1991 (56) ELT 340 Kar Bench: S R Murthy ORDER 1. The petitioner is a public-sector undertaking engaged in the manufacture, assembly and erection of hydraulic gates, hoists, cranes and pen-stock pipes which are eligible to levy under the Central Excise Act ('the Act'). The petitioner field classification list 1/86 effective from 21-3-1986 giving particulars of all excisable goods manufactured by the petitioner. The classification list, a copy of which is produced as Annexure-'C' to the writ petition gives the full description of each item manufactured/warehoused by the petitioner. Item-2 in the said form gives the particulars of parts of components of hydraulic structure, etc., manufactured by the petitioner-company. 2. After the Modvat Scheme was introduced by the Central Government in the year 1986, the petitioner availed of the benefit of modvat in respect of the finished excisable goods. The petitioner, accordingly, field a declaration before the jurisdictional Assistant Collector of Central Excise, as required under the Rules and started availing of the benefit under the Modvat Scheme. Monthly returns were field and a credit account in Form No. RG 23A Part I and II was also maintained. The Classification List was approved by the Assistant Collector effective from 21-3-1986 as per the Endorsement made in Annexure-C. 3. By letter dated 4-5-1987 (Annexure-D), the Superintendent of Central Excise, Hospet, called upon the petitioner to resubmit the declaration in form-I giving better particulars of the final products as also the inputs used in the manufacture of the products. The petitioner sent a reply dated 21-5-1987, as per Annexure-'B' stating that the petitioner was manufacturing and fabricating in their factory only parts of components of hydraulic structurals such as, gates, hoists etc., for assembly at the site. It was also submitted in the said reply that the petitioner had, in the list sent by them in accordance with Rule 57-I, furnished all the details required in the proforma. A copy of the declaration is filed under Rule 57G is produced as Annexure-'F' to the writ petition. Not being satisfied with the reply, two endorsements-H and H1, were issued by respondent-1 on 8-7-1987 and 16-7-1987 directing the petitioner to pay the Modvat availed on such inputs by debiting the same PLA Account and not to avail of the modvat credit until the particulars were furnished. 4. The petitioner has challenged the grounds for issue of Annexures-H and H1 and has asserted in the petition that in the classification list field all the particulars of excisable goods manufactured and the inputs used were furnished. The learned Counsel for the petitioner has pointed out Item 2 in Column No. 2 in Classification List-I/86, (Annexure-C), indicating the "parts of components of hydraulic structure etc"., in the entry pertaining to manufactured goods, and the proper officer, after being satisfied about the declaration, which was in accordance with law, approved the same. In the statement of objections filed on behalf of the respondents this factual assertion is not disputed. 5. The grievance of the petitioner is that the Endorsement-H and H1 were issued on a misconception of the factual position and on an improper reading of the declaration. 6. The other legal ground on which the two endorsements are challenged is :- That such recovery without issue of a show cause notice and without any limitation as to

the period for which such recovery could be made is ultra vires the provisions of Section 11A and violative of the procedure laid down for recovery under the Act. It was argued that any recovery of credit wrongly availed of (without admitting it) ultimately is a recovery under 11A of the Act, which provides for procedure to issue show cause notice, and adjudication in addition to embargo as to limitation. 7. The contention of Sri Ashok Haranahally, the learned Standing Counsel for the Department is that the Scheme of Modvat disallowing of credit wrongly availed of is permitted in the circumstances referred to under Rule 57-I. It was argued that Rule 57-I and 11A operate in different fields and there are certain basic differences between these two provisions. Reliance is also placed on Rule 57P under sub-heading AAA of Chapter-V, which provides for disallowance of money credit wrongly availed of and to adjust it in account current after such disallowance without any bar of limitation. It is also the case of the Department that the schemes contained in 56A providing for proforma credit, the Modvat credit in 57A providing for money credit under Rule 57K are all self-contained schemes prescribing the period of limitation, wherever it is found necessary and that, therefore, the provision 11A should not be imported into the scheme of modvat. 8. The learned Counsel has also relied upon the decision of the Supreme Court in Shivaram v. Radhabai , in which it was held that it is not permissible to accommodate individual version, which may appear reasonable when the intention of the Legislature has been expressed with sufficient vocabular clarity. Reliance was also placed on the decision of the Supreme Court in Assistant Collector of Central Excise v. Ramakrishna Kulwant Rai (41 ELT 3), wherein the validity of Rule 10A was upheld even though it did not prescribe any period of limitation. The action of the respondents in disallowing the credit was, therefore, justified on these grounds. 9. The alternative argument of Shri Ashok was that an opportunity of being heard would be given to the petitioner in case this Court comes to the conclusion that such an opportunity is mandatory before any recovery is made. The learned Counsel cited the decision of the Supreme Court in Institute of Chartered Accounts v. L. K. Ratna for the proposition that unless there is a clear mandate to the contrary principles of natural justice must be read into unoccupied interstices of the statute. 10. The two questions the arises on these arguments are :- (i) whether the respondents are justified in law in disallowing the credit availed of and directing the petitioner to debit the same in the PLA Account; (ii) whether Rule 57I is ultra vires Section 11A of the Central Excise Act and is, therefore, the action taken as per Annexures-H and H1 is in conformity with Section 11A ? Before considering the contentions of the parties, it is necessary to reproduce the scheme of Modvat under the Central Excise Rules. The Scheme of Modvat was introduced with effect from 1-3-1986 in Chapter V under sub-heading AA. Under the said scheme credit of duty paid on excisable goods used as inputs is allowed to a manufacturer. Such credit is allowed and adjusted towards payment of duty of excise leviable on the final products. 57G prescribed the procedure to avail of the credit such as filing of declaration, opening of account in Form RG 23A, Parts I and II and filing of monthly returns indicating the credit taken to RG 23 account etc. The next important Rule is 57I, which reads thus :- “RULE 57-I.

Recovery of credit wrongly availed of or utilised in an irregular manner. - (1) If the credit of duty paid on inputs has been taken wrongly, the credit so taken may be disallowed by the proper officer and the amount so disallowed shall be adjusted in the credit account or the account-current maintained by the manufacturer or if such adjustments are not possible for any reason, by cash recovery from the manufacturer of the said goods : Provided that such manufacturer may make such adjustments on his own in the credit account or the account-current maintained by him under intimation to the proper officer. (2) If any inputs in respect of which credit has been taken are not fully accounted for as having been disposed of in the manner specified in this section the manufacturer shall upon a written demand being made by the Assistant Collector of Central Excise pay the duty leviable on such inputs within 10 days of the notice of demand". This Rule provides for recovery of credit wrongly availed of or utilised in an irregular manner. Under the rule, if the proper officer finds that any credit of duty paid on inputs has been taken wrongly, may disallow the credit and adjust in the credit account or current account maintained by the manufacturer or if such adjustment is not possible for any reason, by cash recovery from the manufacturer. Applying this Rule, the Superintendent of Central Excise issued to the petitioner an Endorsement, as per Annexure-H. This was followed by Annexure-H1, intimating the petitioner-company that whatever Modvat credit was availed of by it upto 16-10-1987 may be debited in PLA and compliance reported. 11. The learned Counsel has sought reliance on several decisions of the Appellate Tribunal in support of his contention on Point No. (ii). Several Benches of the CEGAT have taken a consistent view that the effect of disallowance of an inadmissible credit would, in effect, is a recovery under the Act and the provisions of Section 11A would stand attracted. Since there is no decision of any High Court on this question, I propose to refer to the reasoning and the view taken by Several Benches of the CEGAT. They are : (i) S. M. Energy Teknik and Electronics Ltd. v. Collector of Central Excise and Customs 1989 (42) ELT 700 (Bom.) - 13-4-1989. (ii) Collector of Central Excise v. Bharat Containers Pvt. Ltd. 1990 (48) ELT 520 (Bom.) - 7-12-1989. (iii) Collector of Central Excise v. Telco 1990 (47) ELT 132 (Cal.) - 21-12-1989. (iv) Collector of Customs v. Hindustan Aeronautics Ltd. 1990 (47) ELT 704 (Delhi) - 7-2-1990. (v) Collector of Customs v. Ramesh Chand - 1990 (49) ELT 495 (Delhi) - 20-3-1990. 12. Shri Chanderkumar's further submission was that the Central Government, realising the infirmity pointed out by the CEGAT in its several orders, amended Rule 57-I with effect from 6-10-1988. The Rule, as substituted by Notification No. 28/88, reads thus :- "RULE 57-I. Recovery of Credit wrongly availed of or utilised in an irregular manner. - (1)(i). Where credit of duty paid on inputs has been taken on account of an error, omission or misconstruction, on the part of an officer or a manufacturer, or an assessee, the proper officer may, within six months from the date of such credit, serve notice on the manufacturer or the assessee who has taken such credit requiring him to show cause why he should not be disallowed to such credit and where the credit has already been utilised, why the amount equivalent to such credit should not be recovered from him : Provided that where such credit has been

taken on account of willful misstatement, collusion or suppression of facts on the part of a manufacturer or an assessee, the provisions of this clause shall have effect as if for the words"six months" the word "five years" were substituted. (ii) The proper officer, after considering the representation, if any, made by the manufacturer or the assessee on whom notice is served under clause (i), shall determine the amount of such credit to be disallowed (not being in excess of the amount specified in the show cause notice) and thereupon such manufacturer or assessee shall pay the amount equivalent to the credit disallowed, if the credit has been utilised, or shall not utilise the credit thus disallowed. (2) If any inputs in respect of which credit has been taken are not fully accounted for as having been disposed of in the manner specified in this section the manufacturer shall upon a written demand being made by the Assistant Collector of Central Excise pay the duty leviable on such inputs within 10 days of the notice of demand". The argument developed on the basis of this substitution is that any recovery after disallowing the Modvat credit even for the period prior to the amendment of Rule 57-I should be subject to the provisions of Rule 11A, as laid down by the CEGAT. It was also submitted that Rule 57-I is only procedural and the substantive provision for recovery under the Act is 11A. Therefore, the argument against Rule 57-I, as it stood before amendment, is that the said Rule does not provide for any procedure to adjudicate the dispute and confers arbitrary power on the department. 13. The learned Counsel has also relied upon the decision of the Supreme Court in J.K. Spinning and Weaving Mills Ltd. & Anr. v. Union of India & Ors. [1987 (32) ELT 234], and in particular, the observations made in Paragraph 30, 31 and 32. The Supreme Court was dealing with the scope of Rules 9 and 49 of the Central Excise Rules, which were retrospective by notification No. 20/82. The Supreme Court held, even though the rules were made retrospective from 1944, no recovery could be made beyond the period of limitation prescribed under Rule 11A and the retrospective effect of the amendment must be subject to provisions of Section 11A. Sri Chander Kumar also relied upon the decision of the Supreme Court in State of Bihar v. S. K. Roy , which has laid down the following principle of construction of Statutes in the context of subsequent Legislation :". . . . . In our opinion, the change in the language of S.2(b) of the earlier Act brought about by the amending Act (Act 45 of 1955) was not meant to bring about a change of law in this respect but was meant to fix a proper interpretation upon the earlier Act. It is a well-recognised principle in dealing with matters of construction that subsequent legislation may be looked at in order to see what is the proper interpretation to be put upon the earlier Act where the earlier Act is obscure or ambiguous or readily capable of more than one interpretation". The learned Counsel has also cited the following decisions :- (i) Aggarwal Bros. v. Union of India [1984 (15) ELT 82 (Madras)]. (ii) Government of India v. Citadel Fine Chemicals . (iii) K. Epen Chacko v. Provident Investment Commr. (AIR 1976 S.C. 2610). (iv) Commr. of Income Tax v. Nagappa [114 ITR 707 (Kar)]. They have no direct bearing on the point that arises for decision in this case. 14. It was strenuously contended by the learned Counsel for the petitioner relying on these decisions that the action taken to reverse the credit availed of from the

date of filing/approval of the classification list retrospectively relying on Rule 57I, would be illegal. The petitioner has also prayed for quashing Rule 57I as ultra vires the Rule 11A, or to read down the rule and declare that it must be made subject to the provision of 11A. I have carefully considered the arguments of both sides, the relevant provisions touching the point in issue and the case law. 15. At the outset, it must be noticed that the Department appears to have accepted the decisions of the CEGAT rendered in a number of cases referred to earlier, which support the contentions of the petitioners. From the very fact that the Central Government decided to amend the rule itself, which was done with effect from 6-10-1988 by inserting limitation in Rule 57-I, it can be presumed that the intention of the Legislature was to amend the rule to bring it in conformity with the spirit and scope of Section 11A. The effect of the subsequent amendment to Rule 57-I is a point in favour of the petitioner in the interpretation of Rule 57-I, before amendment, as contended for by the petitioner. 16. Under the Scheme of Modvat credit in Chapter 4AA of the Rules, the assessee gets a rebate on the duty payable on the final products to the extent the duty is paid on inputs. This is in addition to the proforma credit allowed under Rule 56A. Under Rule 56A, the proforma credit of the duty paid on the inputs, material or component parts, is allowed provided the finished excisable goods and the material or component parts are eligible to duty under the same heading or sub-heading of the Schedule to the Central Excises and Salt Act. The additional benefit allowed under the Modvat scheme is that such credit and the duty paid on inputs is allowed, whether the finished product and the inputs availed are under the same heading or not. Thus, under both the schemes, viz., proforma credit and the Modvat credit, the benefit or the rebate the manufacturer gets is the rebate in the duty payable on the manufactured goods under Section 3 of the Central Excises Act. 17. Therefore, having regard to the scheme of Modvat credit, if a proper officer finds that Modvat credit had been wrongly availed of or utilised in an irregular manner, he takes steps to recover the duty which was legitimately payable by the assessee under the Act in accordance with the procedure prescribed under the relevant rules. The scheme provides for debiting the credit availed of to the PLA account, which is a self removal facility provided under the scheme of the Modvat credit. This credit will have to be reversed in accordance with law resulting in recovery of the duty that becomes payable as a consequence of the reversal. Under Rule 57E, the duty in respect of which credit is allowed, is adjusted in the credit account maintained by the assessee prescribed under Rule 57G. Under 57G(4), the manufacturer of final product is required to submit monthly return indicating the particular inputs received during the month and the amount of duty taken as credit along with extracts of Parts I and II of Form RG23A, and, also make available the documents evidencing the payment of duty on the inputs taken, to the proper officer. Therefore, having regard to this scheme, any reversal of the credit availed of by the manufacturer wrongly, results in withdrawal of the allowance of the credit and the proper officer proceeds to recover the amount equivalent to the disallowance in the manner prescribed in Rule 57-I. If, therefore stands to reason why restriction was placed by the Central Govt. on Rule

57I, as amended with effect from 6-10-1988. This restriction is the time-limit of six months for recovery of credit wrongly availed of, if it is an error on the part of the officer, and time limit of five-years is allowed if such credit has been taken on account of, willful mis-statement, collusion or suppression of facts on the part of the manufacturer or an assessee. This amendment brings about uniformity in the procedure prescribed under the Rules as are applicable to both the schemes under 56A and 57A. The substantive law prescribed in the Central Excise Act for recovery of any duty payable, short levy or erroneous refund is Section 11A of the Act which places restriction of the exercise of power in the manner provided therein. Therefore, Rule 57I, as it stood before amendment with effect from 6-10-1988 should receive the same interpretation as it should receive amendment and should be made applicable to the facts of the present case as well. The earliest decision of the CEGAT on this point was by the Bombay Bench in Collector of Central Excise v. Bharat Containers Pvt. Ltd. [1990 (48) ELT 520 (Tri.)]. The Tribunal held thus :- (para-5)."When the credit has been taken wrongly or it is in excess of the eligibility, it is a case of erroneous credit, which can be recovered by a demand. Such a demand cannot go beyond the purview of the statutory provisions of Section 11A of the Central Excises & Salt Act, 1994. Even if Rule 57-I is sought to be invoked it is to be read with the provisions of Section 11A, which is the statutory provision for recovery of any duty - either short-levy or non-levy or duty taken erroneously as proforma or MODVAT credit". 18. In the result, the writ petition is allowed and the Endorsements (Annexures 'H' and 'H1') Dated 9-7-1987 and 16-7-1987 respectively issued by the Superintendent of Central Excise, Range-A, Hospet, are quashed.