

GAHC010138112018



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : C.Ex.App./13/2019

THE COMMISSIONER OF CENTRAL GOODS AND SERVICES TAX AND
CENTRAL EXCISE
MILAN NAGAR, LINE- F, P.O. - C. R. BUILDING, DIBRUGARH- 786003

VERSUS

M/S ASSAM TIMBER PRODUCTS PVT LTD
RUPAI SIDING DOOMDOOMA, DIST.- TINSUKIA, ASSAM, PIN- 786153

Advocates for the appellant: Mr. S.C. Keyal, Sr. SC, CBIC.

Advocate for the respondents: Mr. Arijit Chakrabarti,
Mr. A Das.

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 07.09.2023

Date of judgment : 07.09.2023

JUDGEMENT AND ORDER (ORAL)

Heard Mr. S.C. Keyal, learned Senior Standing Counsel for Central Board of Indirect Taxes as well as Mr. A. Chakrabarti, learned counsel for the respondent.

2. This appeal under Section 35-G of the Central Excise Act, 1944, is directed against the Final Order No. FO/78343/2017 dated 01.12.2017, passed by the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT" for short), Eastern Zonal Bench, Kolkata, in Excise Appeal No. E/70449/2013.

3. By the said order, the learned CESTAT had rejected the demand for duty raised by the appellant, on the ground that the demand was made beyond the normal period of 6 (six) months from the date of issuance of the show-cause notice. Accordingly, the original authority was directed to re-quantify and restrict the demand in terms of the said order by holding that there is no justification to impose any penalty, which was set aside.

4. In this appeal, the case projected by the appellant is that the respondent is dealing in manufacture and sale of "Block Board". The said item was classified under Chapter Tariff Sub-Heading No. 4408.90 and the prescribed Excise duty was being paid thereon. However, on and from 28.02.1986, the respondent had classified their same product under Chapter Tariff Sub-Heading No. 4410.90, where excise duty prescribed was "NIL". The Superintendent of Central Excise, Doomdoo Range-I, issued a demand-cum-show cause notice dated 24.07.1995 to the respondent, stating therein that a refund of Rs.68,59,125.62 was given to the petitioner in respect of Central Excise Duty paid by them for clearing of Block Boards for the period from 28.02.1986 to 25.07.1989, vide Adjudication order No. V(18)33/Refund/AC DIG/90/660-666 dated 14.05.1991, passed by the Assistant Collector of Customs and Central Excise, Digboi, which virtually resulted in clearance of Block Boards at 'nil' rate of duty for the said period. The respondent was also put to notice that for the period between 26.07.1989 to 28.02.1993, the Block Boards were cleared at 'nil' rate of duty by classifying the same under Sub-Heading No. 4408.90 of the Central Excise Tariff. However, the Supreme Court of India, by its judgment dated 20.03.1995, passed in the case of *Collector of Central Excise, Shillong v. Wood Crafts Products & Ors., 1995 (77) ELT 23 (SC)*, had confirmed that the correct classification of Block Board was under Sub-Heading No. 4408.90 of the Central Excise Tariff for the period from 28.02.1986 to 19.03.1990, 20.03.1990 to 28.02.1992 and 01.03.1992 onwards. Accordingly, the following demand was raised upon the appellant:-

(I) Rs.67,04,503.08 (Basic) } Refunded to them for the period from
+ Rs. 1,54,612.54 (Special)} 28.02.1986 to 25.07.1989

(II) Rs.66,85,752.92 (Basic) } Subsequent clearance at NIL rate of
 + Rs. 6,49,888.71 (Special)} duty for the period from 26.07.89 to
 28.02.1993

(III) Total- Rs. 1,33,90,266.00 (Basic)
 + Rs. 8,04,501.25 Special

The said demand was made under Section 11A of the Central Excises and Salt Act 1944, read with Rule 173(1)(2) of the Central Excise Rules, 1944 and moreover, the respondent was also put to notice as to why the said amount shall not be recovered within 30 days from the date of receipt of the notice.

5. The learned counsel for the appellant has submitted that the litigation with regard to the classification of the Block Boards was pending for a long time, and the issue received a quietus from the Supreme Court of India by its judgment passed in the case of *Wood Crafts Products (supra)*. By the said decision, the classification of Block Board was confirmed to be under Sub-Heading No. 4408.90 of the Central Excise Tariff. It is further submitted that the said judgment of the Supreme Court of India was passed on 20.03.1995 and as the show-cause notice was issued on 24.07.1995, it was well within the prescribed period of limitation of 6 (six) months as envisaged under Section 11(A) of the Central Excises and Salt Act, 1944. It has also been submitted that the respondent had availed refund of the tax paid to the extent of Rs.68,59,125.62 and therefore, the issue of classification being settled by the Supreme Court of India, the show cause notice and demand served upon the respondent was valid and within the period of limitation. Accordingly, it is submitted that the impugned appellate order passed by the CESTAT, Kolkata Bench was erroneous and, therefore, the same is liable to be set aside and quashed by upholding the demand made by the Revenue. By referring to the written note of submission submitted on behalf of the appellant, it has been submitted that vide order dated 11.01.1991, passed in Civil Rule No. 282 of 1991, this Court as an interim measure, permitted the Excise authorities to levy and collect Excise duty by classifying Block Board manufactured by the respondent under Sub-Heading No. 4410.90, which attracted 'nil' rate of duty. Therefore, the respondent did not pay the duty prescribed under Sub-Heading 4408.90. Thereafter, by order dated 24.01.1990, passed by this Court in Civil Rule No. 2228 of 1990, had directed the Excise authorities to refund Excise duty to the

respondent from 28.02.1996 onwards. It is also submitted that by order dated 26.06.1992, passed by this Court in Civil Rule No. 1199 of 2022, directed the respondent authorities, as an interim measure to levy excise duty on Block Boards/ veneered Timber Board at 15% *ad valorem* pending disposal of the writ petition, which was paid by the respondent for the period from 29.06.1992 to 21.01.1993. Later on, this Court by a common judgment dated 23.03.1993, in Civil Rule No. 1500/1989 and other connected cases, held that the classification for the Block Board would be under Sub-Heading No. 4410.90. Accordingly, the Central Excise Department had preferred an appeal before the Supreme Court of India and that the Supreme Court of India in the case of *Wood Craft Products Ltd. (supra)*, confirmed the classification of the Block Board under Sub-Heading No. 4408.90. Accordingly, by referring to the following 4 (four) cases, viz., (1) *Collector of Central Excise, Shillong vs. Wood Craft Products Ltd., (1995) 3 SCC 454*; (2) *M/s Samrat International (P) Ltd. Vs. Collector of Central Excise, 1992 Supp (1) SCC 293*; (3) *Anupal Singh vs. State of UP, (2020) 2 SCC 173*; and (4) *Commissioner of Central Excise Vs. Woodcrafts Products Limited, (2002) 10 SCC 734*, it has been submitted that the issue of classification of Block Board was settled by the Supreme Court of India vide judgment dated 20.03.1995. Thereafter, the authorities had raised a demand for Excise duty within the period of limitation and therefore, the demand was sustainable. It has been submitted that the period of limitation should be calculated after deducting the time spent in litigation on the issue raised before the Supreme Court of India regarding classification of Block Board under the Central Excise Tariff Act, 1985. It is also submitted that the said decision of the Supreme Court of India was binding on the Central Excise authorities. Hence, it is submitted that the impugned order is liable to be set aside and quashed.

6. Per contra, learned counsel for the respondent has submitted that they had filed a writ petition before this Court to challenge the levy of Excise duty under Sub-Heading 4408.90. The said writ petition was numbered as Civil Rule No. 1199 of 1992. However, their said writ petition was dismissed of by this Court by order dated 23.03.1993, and the classification of Block Board/V.T. Board was confirmed by this Court to be one under Sub-Heading No. 4408.90 of the Central Excise Tariff Act. It is submitted that pursuant to the said judgment, the respondent had started to make payment of Central Excise duty on Block Board under the Sub-Heading No. 4408.90. Hence, it is submitted that in so far as the

demand of excise duty from the respondent is concerned, the said demand became time barred after six months from 23.03.1993, i.e. the date of judgment of this Court in Civil Rule No. 1199 of 1992. Apart from making oral submissions, the learned counsel for the respondent has also submitted a written note of submissions and has relied upon the following decisions, viz., (1) *Coastal Gases and Chemicals Pvt. Ltd. V. Asstt. C.C.E, Visakapatnam, 1997 (92) ELT 460 (SC)*; (2) *Metal Forgings v. Union of India, 2001 (146) ELT 241 (SC)*; (3) *Commissioner v. Hindustan International Glasses & Industries Ltd., 2005 (182) ELT 12 (SC)*; and (4) *Indian Refrigeration Industries v. Commissioner of E.Ex., Delhi, 2010 (255) ELT 491 (SC)*.

7. This appeal was admitted by order dated 09.12.2019, by framing the following 2 (two) substantial questions of law:-

- a) *Whether the learned Tribunal was justified in emphasizing on a formal order of provisional assessment in a manner which is contrary to the observations made by the Hon'ble Supreme Court in the case of M/s Samrat International (P) Ltd. v. Collector of Central Excise, reported in 1992 (58) ELT 561 (SC)?*
- b) *Whether the learned CESTAT was right in holding that there was no justification to demand duty beyond normal time limit, which was only six months from the date of issuance of show cause notice?*

8. On perusal of the materials on record, it is seen that the appellant has not been able to demonstrate that they had made any provisional assessment in respect of the respondent. It is also seen that the appellant had not raised any demand upon the respondent for payment of Excise Duty for the period from 28.02.1986 to 25.07.1989 and from 26.07.1989 to 28.02.1993. In the said context, it would be relevant to extract the provisions of Section 11A of the Central Excise and Salt Act, 1944, as under:-

11A. Recovery of duties not levied or not paid or short levied or short paid or erroneously refunded.-

(1) When any duty of excise has not been levied or paid or has been short-levied or short- paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short- levied or short-paid or to whom the refund has erroneously been made, requiring him to show

cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short- levied or short- paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub- section shall have effect, as if, for the words "six months", the words " five years" were substituted.

Explanation.- Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

(2) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub- section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) For the purposes of this section-

(i) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) " relevant date" means.-

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short- levied or short- paid-

(A) where under the rules made under this Act a monthly return, showing particulars of the duty paid on the excisable goods removed during the month to which the said return relates, is to be filed by a manufacturer or producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no monthly return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;

(b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of- duty after the final assessment thereof;

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

8. The appellant has not been able to demonstrate that the respondent had not paid the appropriate Excise duty by reason of fraud, collusion or any willful mistake or suppression of facts or in contravention of the provisions of the said Act. Therefore, the appellant has failed to make out a case that the period of limitation should be extended from 6 (six) months to 5 (five) years as per proviso to Sub-Section (1) of Section 11-A of the Central Excise and Salt Act, 1944. The respondent claims that after Civil Rule No. 1199 of 1992 filed by the respondent was dismissed by this Court by order dated 23.03.1993, they had started to pay Excise duty on the Block Board under the Sub-Heading No. 4408.90 w.e.f. the month of March, 1993. The appellant has not denied the said assertion made by the learned counsel for the respondent. Moreover, the appellant has not been able to show that any provisional assessment was made in respect of the respondent for the period from 28.02.1986 to 25.07.1989 or from 26.07.1989 to 28.02.1993 and consequently, payment of Excise Duty was demanded by the appellant. It is also not the case of the appellant that their demand against the respondent for payment of Excise Duty was stayed by any Court, Tribunal or Forum having jurisdiction. Moreover, there is also no material to show that the provisional assessment and/or demand, if any, had translated into the final assessment order against the respondent pursuant to the judgment of the Supreme Court of India in the case of *Wood Craft Products Ltd. (supra)*.

9. The learned counsel for the appellant has placed reliance on the decision of the Hon'ble Supreme Court of India in the case of *M/s Samrat International (P) Ltd. (supra)*, based on which the 2 (two) substantial questions of law were formulated in this appeal. To counter the said cited case, the learned counsel for the respondent has cited four decisions of the Hon'ble Supreme Court of India, referred hereinbefore to demonstrate that the judgment in *Samrat International (supra)* was passed under the peculiar facts of the said case, for which the said decision cannot be accepted as a binding precedent for the purpose of the present appeal. It has been submitted that as the appellant had not been able to demonstrate that the clearance of the Block Boards was made by following the procedure laid down under Rule 9-B of the Central Excise Rules, 1944, the appellant would not be benefited by the said cited case. In the said context, the Court is inclined to reproduce the paragraphs-11 and 12 of the case of *Metal Forgings (supra)*:-

11. *The next question for our consideration is whether the order made by the Assistant Collector on 22.1.1976 could be treated as a provisional classification so as to keep the period of limitation frozen. The Judicial Member in this regard came to a definite conclusion that the said order is a final order against which appeals and revisions were taken recourse to. According to the learned Member merely because there is a continuing dispute in regard to the correctness of the said order of the Assistant Collector by way of appeals and revisions, the same does not make the order of the Assistant Collector anything short of a final order, therefore, he rejected the contention of the revenue on this count. While the Technical Member and the third Member following the judgment of this Court in the case of Samrat International (supra) came to the conclusion that the order of the Assistant Collector could be treated as a provisional order because there was correspondence regarding the excisability and the classification list filed by the appellants. From the above we notice that the majority of the members of the tribunal based their finding that the clearances made by the appellants during the relevant period was provisional in nature mainly because of the finding of this Court in the case of Samrat International (supra). A perusal of this judgment shows that the said judgment was delivered on the peculiar facts of that case and it does lay down a principle in law which enables the revenue to treat every classification made by it or the goods removed by virtue of said classification to be treated as the provisional merely because some appeal or other proceeding is pending, questioning the classification involved therein. As a matter of fact, this Court in the case of Coastal Gases & Chemicals Pvt. Ltd. v. Asstt. C.C.E., Visakhapatnam (supra) while considering the judgment in Samrat International case (supra) held thus:*

"On the facts of that case, however, this Court had held that the payment of duty which was made by the appellants in that case was provisional and the procedure under Rule 9B had been followed. We have not been shown any material on record to indicate whether the appellants in the present case had cleared carbon dioxide manufactured by them by following the procedure laid down in Rule 9B or that the payment of excise duty which the appellants had made during the relevant period was provisional."

12. *From the above, it is clear that to establish that the clearances were made on a provisional basis, there should be first of all an order under Rule 9B of the Rules, and then material to show that the goods were cleared on the basis of said provisional basis, and payment of duty was also made on the basis of said provisional classification. These facts in the instant case are missing, therefore, in our opinion there is no material in the instant case to establish the fact that either there was a provisional classification or there was an order made under Rule 9B empowering the clearance on the basis of such provisional classification. In the absence of the same, we cannot accept the argument of the revenue that in fact*

the order of the Assistant Collector dated 21.1.1976 is a provisional order based on which clearance was made by the appellants or that they paid duty on that basis. On the contrary, as held by the Judicial Member the said order of classification was a final order, therefore, the Revenue cannot contend the limitation prescribed under [Section 11A](#) does not apply.

10. Paragraph-18 of the case of *Hindustan National Glass & Industries Ltd. (supra)* is reproduced as under:-

18. *There is one other point which needs to be noted i.e. plea of the Revenue that the assessment orders were provisional in nature. This plea is equally untenable, in view of what has been stated by this Court in Metal Forgings v. Union of India, (2002) 146 ELT 241 SC. It was held that in order to establish that the clearances were on provisional basis an order under Rule 9B of the erstwhile Central Excise Rules, 1944 (in short the 'Rules') and clearances/payment of duty on provisional basis are essential. Reliance was placed on an earlier decision of this Court in Coastal Gases and Chemicals Pvt. Ltd. v. Assistant Commissioner of Central Excise, Visakhapatnam, (1997) 92 ELT 460 SC.*

11. Paragraphs 12 to 15 of *Indian Refrigeration Industries (supra)*, are quoted as under:-

12. *The larger Bench of the Tribunal had recorded the finding, reproduced above, relying upon a judgment of this Court in Samrat International (P) Ltd. vs. Collector of Central Excise, 1992 (58) ELT 562 (SC). It has been held in the said case that the assessments made till the approval of the classification list would be deemed to be provisional and therefore, procedure contemplated by Rule 9-B is not required to be followed.*

13. *Counsel for the appellant has pointed out that the observations made by this Court in Samrat International (P) Ltd. (supra) were explained in Metal Forgings vs. Union of India, 2002 (146) ELT 241(SC) and it was held that the decision in Samrat International (P) Ltd.(supra) was given on its own peculiar facts and could not be understood to mean that till the classification list is approved, the assessment framed would be treated to be provisional without following the procedure laid down under Rule 9B of the Rules. It was held:*

"From the above, it is clear that to establish that the clearances were made on a provisional basis, there should be first of all an order under Rule 9B of the Rules, and then material to show that the goods were cleared on the basis of said provisional basis, and payment of duty was also made on the basis of said

provisional classification. These facts in the instant case are missing, therefore, in our opinion there is no material in the instant case to establish the fact that either there was a provisional classification or there was an order made under Rule 9B empowering the clearance on the basis of such provisional classification. In the absence of the same, we cannot accept the argument of the Revenue that in fact the order of the Assistant Collector dated 21.1.1976 is a provisional order based on which clearance was made by the appellants or that they paid duty on that basis. On the contrary, as held by the Judicial Member the said order of classification was a final order, therefore, the Revenue cannot contend the limitation prescribed under Section 11A does not apply."

14. *This decision in Metal Forgings's case was approved by a three Judge Bench of this Court in Commissioner of Central Excise, Calcutta vs. Hindustan National Glass & Indus. Ltd. 2005 (182) ELT 12 (SC) (refer to the observations made in para 18 of the judgment).*

15. *In view of the subsequent judgments of this Court in Metal Forgings's case and Hindustan National Glass & Indus. Ltd.'s case (supra), the impugned order based on the decision of Samrat International (supra) cannot be sustained. The assessment framed till the approval of the classification list on 17.12.1979 cannot be treated to be provisional."*

12. From the above and the facts of the present case, it is seen that the alleged demand of the appellant for payment of Excise duty is not based on any provisional assessment. Moreover, it is not the case of the appellant that any Court, Tribunal or Forum having jurisdiction had stayed the demand for Excise Duty made against the respondent. Therefore, the Court is inclined to hold that the impugned decision of the CESTAT, thereby rejecting the contention of the appellant of the demand was barred by limitation is not liable to be interfered with.

13. In the aforesaid context, it is noticed that in paragraph 6 of the Order –In-Appeal No. 02/DIB/CE (A)/GHY/13 dated 21.01.2013, it has been recorded that the duty was finally paid by the assessee, but after the order was passed by the Tribunal as well as by this Court, they did not pay the duty and the Department also did not demand the duty and that for the duty already paid by them, the respondent had claimed refund, and the refund was processed and paid by the authorities.

14. Paragraph 6 of the said Order-In-Appeal dated 21.01.2013 is quoted herein below:-

6. *Being aggrieved, the assessee filed this appeal on the grounds that-*

- (i) *In the present case, the initial dispute was regarding classification of Block Boards while the department wanted to classify them under Sub-heading No. 4408.90. The assessee had taken the view that the Block Boards were covered by sub-heading No. 4410.90 and no duty was payable under sub-heading No. 4410.90 as the Hon'ble CEGAT decided the case in favour of the assessee that these goods were classifiable under Sub-heading No. 4410.90. No dispute remained so far as the assessee was concerned. The duty was paid finally by the assessee but after the order was passed by the Tribunal as well as by the High Court, Guwahati they did not pay the duty and the department also did not demand the duty. For the duty already paid by them, they preferred refund claim, which was ultimately refunded by the department. It appeared from the case records that the department never came out with the proposal that the assessments were provisional. In the case of provisional assessment, no refund or demand can be made until and unless the assessments are made final. Hence, the assessments could not be treated to be provisional in this case.*
- (ii) *There was no order from the adjudicating authority under the provisions of Rule 9B of the CE Rules, 1944 for assessing the goods provisionally. In that case, the department would not have paid the refund to the assessee. When the refund was sanctioned to the assessee, it cannot be said that the goods were provisionally assessed. The adjudicating authority failed to appreciate that when they sanctioned the refund claim of the assessee in terms of the order of the Hon'ble High Court, Guwahati, it is to be taken that there was no provisional assessment.*
- (iii) *It is settled law that demand of duty or refund of duty cannot be made when the assessments are provisionally made. Demand and penalty can be made only when the provisionally assessments, if any, are finally decided. In the present case, there is no question of provisional assessment otherwise the refund of duty could not be made to the assessee.*
- (iv) *In the SCN or in the proceedings hereinbefore, the department had never raised the protest that the assessments were provisional and for this reason, they were not required to pay the refund of the duty.*
- (v) *In the present case, the assessee did not apply for provisional assessment nor did the adjudicating authority pass any order for provisional assessment. There is no reference anywhere with regard to the order of the provisional assessment passed by the adjudicating authority. Under such circumstances and in view of the decisions of the Hon'ble Supreme Court in this regard that provisional assessment can be done only under the order passed under Rule 9B of the CE Rules, 1944. It has to be taken that the assessments were not*

provisional. The order of the adjudicating authority is erroneous and is not maintainable.

- (vi) *The point of provisional assessment had been taken beyond the parameter of the SCN. In the SCN provisional assessment had not been mentioned. Hence, the adjudicating authority could not raise such point in the order without referring the same in the SCN. The order of the adjudicating authority is therefore, not maintainable under the statute.*
- (vii) *After the classification was determined by the Hon'ble Tribunal and by the Hon'ble Guwahati High Court, no objection was raised by the department towards refund of the said amount before the Hon'ble High Court, Guwahati. The refund was ordered to be paid by the department to the assessee and the same was paid by the adjudicating authority in his order dated 1/2/1991 and in the order dated 1/2/1991 there was no mention of provisional assessments of the goods. Only in the present order passed by the adjudicating authority, there had been mentioned that the assessments were made provisional as per R.T-12 Returns but the assessee submitted that there having no valid order passed by the adjudicating authority, the said order is not maintainable. The order of the adjudicating authority is therefore, not sustainable.*
- (viii) *The adjudicating authority had not mentioned in the impugned order that the order was passed under the provisions of Rule 9B of the CE Rules, 1944. It had already been mentioned earlier that the assessee did not have any such order with them. Hence, no order under Rule 9B was passed by the adjudicating authority.*
- (ix) *The adjudicating authority had also not shown or exhibit any evidence of Bond, if any, were executed by the assessee or valid till date when the assessments are stated to have been provisional. Mere statement that the order was provisional is not adequate. The order reference has to be given and it is to be proved by the department that the order was valid till date along with provisional assessment and the Bond and Bank Guarantee were also valid and were sufficiently enhanced to cover the differential amount. Without these factors, the assessment cannot be treated as provisional. Mere writing in the assessment memo that the assessment was provisional is of no consequence.*
- (x) *The observation of the adjudicating authority that all the RT-12 returns of the material period were assessed provisionally by the department and all were subsequently finalized after the Supreme Court order dated 20/3/1995 is without evidence and are mere statement. The adjudicating authority had not proved that the assessment were provisional under valid order and valid Bond and Bank Guarantee. Without this evidence it cannot be treated that the said assessment were provisional. The adjudicating authority also stated that when*

the order for provisional assessment was finalized and it was communicated to the assessee, the receipt of such order by the assessee is the evidence. This is apparently erroneous and is not maintainable. The assessee demands evidence from the department to be produced before the Commissioner of Appeals.

(xi) *In view of discussions made hereinbefore the assessee submitted that there is no merit in the order passed by the adjudicating authority. He had passed the order in his own way without giving proper evidence that the assessment were provisional and assessment were finalized. This is improper and incorrect and such order is not maintainable under the law.*

(xii) *The assessee submitted that reopening of the case cannot be done with that they are barred by limitation. Limitation cannot be over written by way of reopening the case after finalization of the assessment. The finding of the adjudicating authority is not proper and correct. In view of the discussions made hereinbefore, the assessee submitted that there is no merit in the order passed by the adjudicating authority. The order is erroneous, and is not tenable. There is no question of refund of the said amount, which was paid by the department after passing an order on 1/2/1991."*

15. The factual position, as mentioned in the said order, could not be demonstrated to be an erroneous finding by the appellate authority, i.e. Commissioner (Appeals).

16. Therefore, in respect of Substantial Question of Law No. 1, the Court is inclined to hold that the perspective, in which the learned CESTAT had given emphasis on the formal order of provisional assessment, was justified and the said question is answered in the affirmative and against the appellant. In the absence of any document to show that the assessment made by the appellant was provisional, or that a demand was made but stayed by competent Court/Tribunal/Forum, having jurisdiction, the reliance on the case of *Samrat International (supra)* would not help the appellants in any manner whatsoever in light of the cases cited by the learned counsel for the respondent, which is discussed herein before.

17. In view of the discussions above, in so far as the Substantial Question of Law No. 2 is concerned, this Court is inclined to hold that as the facts of this case, the respondent had started paying excise duty under Sub-Heading No. 4408.90 pursuant to the judgment of this Court dated 23.03.1993, in Civil Rule No. 1199/1992 and that on their application, the Excise duty refund was made by the appellant's authorities and it has not been shown that the

refund was made subject to the issue of classification being settled by the constitutional Courts. Therefore, this Court is inclined to hold that the 6 (six) month's limitation for making a demand for Excise duty from the respondent would run from 23.03.1993 as per Section 11-A of the Central Excise and Salt Act, 1944 and therefore, the claim of recovery of refund is found to be barred by limitation and accordingly, the second substantial question of law is also decided in affirmative and against the appellant by holding that the finding of CESTAT that there was no justification to demand duty beyond normal time limit, which is only six months, calls for no interference from this Court.

18. Accordingly, as both the substantial questions of law are decided against the appellant, this appeal stands dismissed. There shall be no order as to cost(s).

JUDGE

JUDGE

Comparing Assistant