

***HON'BLE SRI JUSTICE G. CHANDRAIAH**
AND
HON'BLE SRI JUSTICE CHALLA KODANDA RAM
+ C.E.A. No.17 OF 2005

%14.08.2015

The Commissioner Customs & Central Excise, Tirupati.

....Appellant.

AND

M/s. Panyam Cements & Minerals Industries Ltd., Kurnool.

.....Respondent.

! Counsel for the Appellant: Standing Counsel for Customs and
Central Excise Department

^ Counsel for respondent : Sri C.V. Narasimham

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? Cases referred:

- [1] 2008 (13) SCC 1
- ² 2012 SCC 518
3. (1981) 8 ELT 565 (Madras)
4. 2000 6 SCC 650
5. 1997 (90) ELT 260 (SC)
6. 2002 (142) ELT 522 (SC)
7. 2002 (143) E.L.T 247 (SC)
8. 2004(168) ELT 145 (SC)
- ⁹ (1997) 5 SCC 536
10. 2002 (145) ELT 168
11. 1989 (43) ELT 115 (Tri)
12. (1996) 10 Supreme Court Cases 520
13. 2011 (271) ELT 164 SC
14. 1996 (87) ELT 19 SC
15. 1998 (97) ELT 52 Madras
- ¹⁶ 1989 (43) ELT 115 (Tri)
17. (1976) 4 SCC 677

18. 2015 (320) ELT 703 (Mad)

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH**

C.E.A. No.17 OF 2005

Between:

The Commissioner Customs & Central Excise, Tirupati.

....Appellant.

And

M/s. Panyam Cements & Minerals Industries Ltd., Kurnool.

....Respondent

DATE OF JUDGMENT PRONOUNCED: 14.08.2015.

SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE G. CHANDRAIAH

AND

HON'BLE SRI JUSTICE CHALLA KODANDA RAM

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| 1 | Whether Reporters of Local newspapers may be allowed to see the Judgments? | Yes/No |
| 2 | Whether the copies of judgment may be marked to Law Reporters/Journals? | Yes/No |
| 3 | Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? | Yes/No |

HON'BLE SRI JUSTICE G. CHANDRAIAH

AND

HON'BLE SRI JUSTICE CHALLA KODANDA RAM

C.E.A. No.17 OF 2005

JUDGMENT:- (per Hon'ble Sri Justice Challa Kodanda Ram)

This is an appeal filed by the department under Section 35(G) of the Central Excise Act, 1944 (for short, "the Act), challenging the order dated 02.07.2004, passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Bangalore (in short "the Tribunal), in Final Order No.1176 of 2004 made in Appeal No.E/Appeal No.550/2002.

2) The brief facts of the case are that M/s. Panyam Cements and Minerals Industries Limited, Kurnool hereinafter referred to as "the respondent". The respondent is manufacturers of cement and clinker falling under Chapter Heading 2502.29 and 2502.10. The respondent filed a price list effective from 1.10.1975 in respect of Grey Portland cement and claimed the deduction of packing charges from the assessable value on the ground that the packing material is of durable nature and is returnable as provided. The Jurisdictional Assistant Commissioner did not accept the exclusion of packing charges from the assessable value and the price list was approved including the packing charges thereon. The respondent after receipt of the approved price list started paying duty under protest. Though the respondent paid the duty under protest, thereafter, he did not take any steps to challenge the approved price list by filing appeal questioning the inclusion of package charges from the assessable value. Thereby the duty payable came to be crystallized as approved by the Assistant Commissioner.

3) On 7.5.1985, the respondent filed the refund claim for an amount of Rs.17,68,481.56 ps., claiming the said amount has been paid as excise duty on packing charges during the period 1.10.1975 to 8.1.1976 on the ground the packing material i.e., gunny bags are of durable nature and is returnable within the meaning of Section 4(4)(d)(1) of the Act and thus the value is deductible from assessable value. By issuing show-cause notice dated 17.8.1986 and after considering the objections

filed by the respondent, adjudication order was passed on 19.08.1986 granting refund of Rs.17,68,481.56 ps. Thereafter, the department filed an appeal against the adjudication order and the Commissioner had set aside the same on 29.10.1987 in Appeal No.142 of 1987(H)(D) dated 29.10.1987. In the interregnum period pursuant to the refund order granted by the Assistant Commissioner amounts were refunded to the respondent. The respondent questioned the order dated 29.10.1987 by filing Appeal No.1022 of 1996 before the CEGAT, South Zonal Bench at Madras. The said appeal was allowed on 7.8.1996 directing the Appellate Commissioner to consider the appeal *denovo*. Thereafter, once again the Appellate Commissioner vide its order dated 4.2.2002 in Appeal No.66/97(H)(D)CE allowed the appeal by setting aside the order in original dated 19.09.1986 holding that the respondent was not entitled to refund and thus the amounts of Rs.17,68,481.56 ps., is liable to recover from the respondent. Further a direction was issued to pay back the said amount. The respondent once again filed the appeal before the CEGAT and the same came to be numbered as Appeal No.E/550/2002. The CEGAT while confirming the order dated 4.2.2002 held that the respondent was not entitled to claim refund of the amounts paid during 1.10.1975 to 8.1.1976. However, held that the said amounts were not recoverable from the respondent on the ground that no proceedings were issued under Section 11A of the Act. In the above set of facts, the department is in appeal raising the following substantial questions of law:

1. **“Whether an appeal can be filed before the appellate authority under Section 35E of the Act and the recovery of erroneous refund can be based on the decision of the appellate authority;**

or

2. **Whether show cause notice is required to be issued within the time limit laid down in Section 11 A of the Act for recovery of such erroneously granted refund?”**

4) Heard Sri Jalakam Satyaram, learned standing counsel for the

Appellant-Customs and Central Excise Department and Sri C.V. Narasimham, learned counsel for the respondent.

5) Having perused the record and having considered the rival submissions, we are of the view that the controversy lies in a narrow compass. In the admitted and undisputed set of facts, the real question which falls for consideration besides the substantial question of law as raised by the department is that

3. “Whether in the fact and circumstances of the case, the resort to Section 11A of the Act is mandatory for recovering the refund granted pursuant to the adjudication order passed under Section 11B of the Act which adjudication order subsequently came to be declared as unsustainable.”

6) As the above question is the one which arise in the facts of the present case, we deem it appropriate to frame the question in exercise of the powers conferred on this Court under Section 35G3 of the Act in addition to the questions which have been raised by the appellant.

7) Learned counsel for the appellant submits that the Tribunal has erred in holding that the independent proceedings under Section 11A of the Act are required to be initiated for recovering the sum of money which has been refunded to the respondent in the process of adjudicating claim under Section 11B of the Act in spite of the fact that on merits the Tribunal had found that the respondent was not entitled to such refund. Learned counsel further submits that in the set of facts, the department is not seeking to recover erroneously refunded duty amount but was seeking to recover the duty amount refunded on account of the adjudication order passed on 19.9.1986 which order came to be set aside in the appeal proceedings. In other words, the recovery was sought to be made by way of restitution and putting back the parties in the same position before passing the adjudication order. Learned counsel submits that the very refund claim was not maintainable and the same could not have been entertained by the Assistant Commissioner

after a long lapse of time and thus the alleged exercise of power by the Assistant Commissioner under Section 11B of the Act was itself erroneous and the said aspect stands confirmed by the orders of the appellate authorities which orders have become final. Thus holding the respondent was never entitled for refund of the alleged excise duty amount paid. Inasmuch as the very adjudication order holding that the respondent was not entitled to refund of the amount came to be set aside and the amount is recoverable from the respondent and the provisions of Section 11A have no application in such situations.

8) Learned counsel for the appellant submits that the circular dated 22.9.1998 of the C.B.E.C relied by the Tribunal is erroneous and the said circular has no application to the facts of the case. Apart from the fact the said circular was not binding on the Tribunal being a quasi judicial forum. Learned counsel for the department cited the following judgments to buttress her arguments.

- a) **CCE vs. Ratan Melting and Wire Industries** ^[1]
- b) **CCE vs. Minwool Rock Fiber Ltd** ^[2]
- c) **Madras Rubber Factory Ltd vs. Assistant Collector of Central Excise, Madras.** ^[3]
- d) **Collector of Central Excise, Kanpur vs. Flock (India) Pvt. Ltd** ^[4]
- e) **Assistant Collector of Customs vs. Anam Electrical Manufacturing Co.,** ^[5]
- f) **Asian Paints Ltd vs. CCE, Bombay** ^[6]
- g) **CCE, Shillong Vs. Wood Craft Products** ^[7]
- h) **Kalyani Packing Industry vs. Union of India** ^[8]

9) On the other hand, Sri C.V. Narasimham, learned counsel for the respondent contends that the order of the Tribunal is unassailable and the scope of the appeal is limited to the questions of law which have been raised by the department, particularly in the facts of the present

case. The learned counsel further submits that the Tribunal had rightly relied on the circular of the C.B.E.C apart from the judgment of the Supreme Court in **Kalyani Packaging Industry case** (8 supra). Learned counsel contends that it is now well settled through various judgments of the Tribunals and the same have been approved by the Supreme Court; that it is impermissible for the department to resort to the provisions of Section 35E of the Act for recovering erroneously refunded duty amount and thus holding independent Section 11A proceedings are required to be initiated. He further submits that the only way to recover the erroneously refunded duty amount is under the provisions of Section 11A of the Act and there are no other provisions in the Act. In that view of the matter, the order of the Tribunal is sustainable.

10) To answer the above mentioned questions of law, it would be necessary to notice the relevant provisions as applicable during the years 1975-76, the duty was leviable under the provisions of Sections 3, 4 of the Act and read with Rule 173B of the Rules. Rule 173B of the Rules provides for filing an application seeking approval of the price list with the duty payable. Rule 173B3 provides for paying the duty under protest pending approval of the list or when the list is not accepted by the authorized officer. Rule 223B prescribes the procedure for filing protest petition and the adjudication of the protest application. Rule 233B so far as relevant may be noticed.

11) Rule 233-B of the Rules of 1944 read as under:-

“233B. Procedure to be followed in cases where duty is paid under protest.-

Where an assessee desires to pay duty under protest he shall deliver to the Proper Officer a letter to this effect and give grounds for payment of the duty under protest.

(2) On receipt of the said letter; the Proper Officer shall give an acknowledgement to it.

(3) The acknowledgement so given shall, subject to the provisions of sub-rule

(4), be the proof that the assessee has paid the duty under protest from the day on which the letter of protest was delivered to the Proper Officer. (4) An endorsement "Duty paid under protest" shall be made on all copies of the gate-pass, the Application for Removal and Form R.T.12 or Form R.T. 13,

as the case may be .

(5) In cases where the remedy of an appeal or revision is not available to the assessee against an order or decision which necessitated him to deposit the duty under protest, he may, within three months of the date of delivery of the letter of protest give a detailed representation to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise.

(6) In cases where the remedy of an appeal or revision is available to the assessee against an order or decision which necessitated him to deposit the duty under protest, he may file an appeal or revision within the period specified for filing such appeal or revision, as the case may be.

(7) On service of the decision on the representation referred to in sub-rule (5) or of the appeal or revision referred to in sub-rule (6) the assessee shall have no right to deposit the duty under protest: D.B. OTHER TAX REFERENCE NO. 24/2004. M/s Shree Shyam Filaments Vs. CCE, Jaipur // 10 // Provided that an assessee shall be allowed to deposit the duty under protest during the period available to him for filing an appeal or revision, as the case may be, and during the pendency of such appeal or revision, as the case may be.

(8) If any of the provisions of this rule has not been observed, it shall be deemed that the assessee has paid the duty without protest.

Note:—A letter of protest or a representation under this rule shall not constitute a claim for refund.”

12) In the facts of the present case, it is an undisputed and admitted fact that though the respondent paid the duty under protest, he did not take any further steps as prescribed under Rule 233B of Rules for determination of the correct duty payable and thereafter seek refund of the amount excess paid, if any. Rule 233 B(8) coupled with the note makes it clear and categorical breach in following the provisions and procedure prescribed under the Rule 233B of the Rules would attach the finality to the duty as payable. Further the Rules also prescribe a clear limitation beyond which the refund of the excess duty paid is impossible.

13) At this stage, Section 11B of the Act as was in force at the relevant point of time, may be noticed.

Section 11B reads as under:

Claim for refund of duty.

(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months ¹ from the relevant date ⁴ in such form as may be

prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person: Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of subsection (2) as substituted by that Act]: ⁴ Provided further that] the limitation of six months shall not apply where any duty has been paid under protest. ²

(2) ⁴ if, on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund: Provided that the amount of duty of excise as determined by the Assistant Collector of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is, relatable to--

(a) 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;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Collector of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify: Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (f) of the first proviso to subsection (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its reassembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified

form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

[\(5\)](#) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette."]³ Explanation.- For the purposes of this section,-

[\(A\)](#) " 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;

[\(B\)](#) " relevant date" means,-

[\(a\)](#) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods,-

[\(i\)](#) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

[\(ii\)](#) if the goods are exported by land, the date on which such goods pass the frontier, or

1. Subs. by Act 44 of 1980, s. 49, for" from the date of payment of duty".

2. Explanation to sub-section (1) omitted by s. 49, *ibid*.

3. Subs. s. 49, *ibid*., for Explanation

4. Ins. and Subs. by Act 40 of 1991, S. 3 (w. e. f. 20- 09- 1991).

[\(iii\)](#) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

[\(b\)](#) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

[\(c\)](#) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

[\(d\)](#) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

[\(e\)](#)⁴ in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;"]

[\(f\)](#) in any other case, the date of payment of duty.]

14) Rules 233B of the Rules came to be inserted with effect from 11.5.1981. Section 11B and Rule 223B are two different provisions which deal with the refund of excise duty. While Section 11B sets out a limitation of six months for making of an application for refund of any

duty of excise paid, Section 11B does not lay any limitation for such application to be made in cases where the excise duty is paid under protest. (The starting point of six months from the relevant date came to be inserted by the Finance Act No.2 of 1980). Such protest application is required to be considered in terms of Rule 9B and Rule 173CC.

15) The obvious reason for not placing any limitation made applicable for the duty paid under protest is that the same is required to be adjusted on determination of the correct duty payable on the determination of the protest petition. However, in the present case, we may observe the aspect of limitation is being dealt with incidentally though the same does not arise in the facts of the present case because the duty payable as per the approved price list became final by operation of Rule 233B(8) of the Rules. As noted above, in view of operation of Rule 233B the duty as approved had become final. In the first place the refund application is misconceived and was not maintainable as the respondent failed to avail the remedies available under the Act. In this context reference may be made to the judgment of the supreme Court in **Mafatlal Industries Ltd., and Others Vs. Union of India and Others** ^[9] (paras 79 and 104). Further we also notice that the Supreme Court in **Union of India (UOI) and ors. Vs. Uttam Steel Ltd.,** ^[10] had categorically held that the claim under 11 B of the Act could be made only in cases where the claim is allowed that is the claims made within limitation. In that view of the matter the very application filed by the respondent seeking refund in the year 1985 was not maintainable and ought to have been dismissed by the authority - Assistant Commissioner without any further discussion.

16) In the light of the above statutory scheme, the real question that is required to be considered is the validity or otherwise of the refund order granted by the Assistant Commissioner on 19.09.1986. In the refund order, the Assistant Commissioner went on to decide the issue the validity or otherwise of the duty demanded as if the same was in issue,

which could have been done by him only in the process of considering the protest petition filed under Rule 233B read with Rules 173B and 173CC. In other words, the consideration of refund application was erroneous as the same was not maintainable. The Appellate Commissioner rightly set aside the same which also came to be confirmed by the Tribunal. In that view of the matter, the refund of money which has been made to the respondent was in the process of adjudicating his claim under Section 11B of the Act. A careful analysis of the Sections 11A and 11B of the Act would leave no manner of doubt that there is an adjudication process involved in the processing of the applications made under Sections 11A and 11B of the Act and further the orders passed under Sections 11A and 11B of the Act are appealable. The determination of an application made under Section 11B of the Act would result in the entitlement of an applicant for refund of any excise duty paid. If a very determination does not result in declaration of entitlement of refund any money paid in obedience to an order by an authority in the process of adjudication of such claims cannot be termed as granting of erroneous refund. Such payment would fall in the category of implementation of an order, subject to finality of such order. In other words, such refund would be outside the scope of the erroneous refunds contemplated under Section 11A of the Act. In a way Section 11A and 11B of the Act operate in two different streams.

17) The situation can be best explained by reference to a civil proceedings of money suit. Pending adjudication of an appeal amount deposited / paid in honouring the judgment and decree would have been repaid back without there being any requirement of a separate suit. Present facts of the case are similar to the above illustration.

18) In the light of the conclusion we arrived at that Sections 11A and 11B of the Act are two independent provisions and parameters which are required to be considered in the process of application under Sections 11A and 11B of the Act being totally different and independent

there is no interconnection between the same. The orders passed under both the Sections 11A and 11B of the Act are amenable for appeal and further appeal to the higher forums. There is no warrant for one to conclude for implementing the orders passed under Section 11A of the Act recourse is to be taken to the provisions of Section 11A of the Act. We are not impressed with the argument of the learned counsel for the respondent that the authorities being bound by the circular and it is not open for the authorities not to implement the same. In view of the judgment of the Supreme Court in **Minwool Rock Fiber Ltd case** (2 supra), the departmental circulars are not binding on the Tribunal and at any rate, the Tribunal did not say that they are bound by the circulars. However, reliance has been placed by the Tribunal on the decision of the Tribunal in the case of **Richardson & Cruddas Ltd., Vs CCE, Bombay** ^[11].

19) A careful reading of the circular reveals that the Tribunal had quoted the observations from the judgment of Supreme Court in **Collector of Central Excise vs. Re Rolling Mills** ^[12] which refers to the judgment of the Supreme Court in **Union of India and others vs. Jain Shudh Vanaspati Ltd., and another** ^[13]. The matter arose from the judgment of the Delhi High Court wherein the Delhi High Court had set aside the show cause notice issued to the company therein under the Customs Act alleging import of stainless steel containers in the guise of mild steel. In the **Jain Shudh Vanaspati case** (13 supra), the issue was relating to recovery of the money and does not relate to a case of "erroneous refund". Further in **Re Rolling Mills case** (12 supra), the Supreme Court disposed of the matter on a concession statement made by both the parties that the issue is covered by **Jain Shudh Vanaspati case** (13 supra). When we examine closely the **Re Rolling Mills case** (12 supra), there is no similarity and as the disposal of the case in **Re Rolling Mills case** (12 supra) is based on concession statements, in our considered opinion, there is really no law enunciated by the Hon'ble Supreme Court.

20) A careful reading of the Tribunal order in **Re Rolling Mills case** (12 supra), reveal that firstly the question involved in the said case is with regard to the time limit available for the Commissioner (Appeals) to exercise the jurisdiction under Section 35E of the Act. Secondly, the refund order granted under Section 11(A) of the Act was the one which was challenged before the Commissioner (Appeals) after lapse of time limit prescribed under Section 35E of the Act. In that context, the Tribunal had held filing of appeal or the application within five years does not save the demand from being time barred. In other words, this is not a case arising in the context of Section 11B of the Act or in the context an order under Section 11B of the Act being challenged before the appellate authorities. The order of the Supreme Court dismissing the appeal of the department thereby confirming the order of the Tribunal in **Re Rolling Mills case** (12 supra) has no application to the facts of the present case before us and as such it has no application. Likewise, the reliance placed by the learned counsel for the respondent on **Grasim Industries vs. Commissioner of Central Excise** ^[14] has also no application to the present case as the issue involved in the said case was whether the appellant therein can be said to be eligible for refund of the duty claimed by it in terms of Section 11B of the Central Excise and Salt Act, 1944.

21) In the said case, the appellant challenged the show cause notice issued under Section 11A of the Act contending that the show cause notice issued to him is bad and the same was issued by the department without filing any appeal. In the facts of the said case, **Grasim Industries case** (14 supra) was not the party to the adjudication process. Show cause notice dated 15.03.1993 was issued seeking to recover the refund amount paid to the company on the ground the company was only a buyer of the product and not the manufacturer who paid the duty and thus was not eligible to claim the refund. In those facts situation the Supreme Court dismissed the

appeals, where the challenge was made to the issuance of proceedings under Section 11 A of the Act.

22) Learned counsel relied on the judgment of the **Ranadey Micronutrients Vs Collector Central Excise** ^[15] for the proposition *“The whole objective of such circulars is to adopt a uniform practice and to inform the trade as to how a particular product will be treated for the purposes of Excise duty. It does not lie in the mouth of the Revenue to repudiate a circular issued by the Board on the basis that it is inconsistent with a statutory provision. Consistency and discipline are of far greater importance than the winning or losing of court proceedings.”* We have no quarrel with the general statement of law declared by the Hon’ble Supreme Court. However, in the facts of the present case the same is not applicable as firstly the circular itself has proceeded on account of the misunderstanding of the judgment of the Supreme Court in **Re-rolling Mills Case** (12 supra), which was decided based on the consensus made by the parties with respect to the **Jain Shudh Vanaspati Ltd., case** (13 supra). This aspect of the matter was already dealt by us supra.

23) On the other hand in **Madras Rubber Factory Ltd., case** (3 supra) a learned single Judge of the Madras High Court had considered the scope of ‘erroneous refund’ and held as under:

“Para 11. The next question for consideration is whether the refund has been made erroneously. In this case, the petitioner claimed refund on the ground that the value of the metal containers could not have been included in the assessable value of tread rubber for the purpose of excise duty, that the mistake was realised only by the order of the Appellate Collector passed on 8-6-1973, and therefore, it was entitled to the refund of the amount paid on the value of the metal containers by way of mistake. The first respondent went into the claim of refund put forward by the petitioner and on a consideration of the contentions advanced on behalf of the petitioner came to the conclusion that the petitioner was entitled to a refund of the amount paid on the value of the tin containers as the same is not includible in the assessment of tread rubber for the purpose of excise duty. The refund was made only pursuant to the said order. Consequently, it cannot be said that refund was made erroneously. A refund in order to constitute

'erroneous refund' must have been made by reason of inadvertence, error or misconstruction as will be seen from the discussion in the following paragraph. Therefore, I have no hesitation to hold that rule 10 of the Rules is not applicable to this case."

24) The facts of the present case are identical and the above judgment squarely applies to the case on hand. Likewise, in **Flock (India) Pvt. Ltd., case** (4 supra) the Hon'ble Supreme Court has succinctly dealt with the finality attached to the orders passed in proceedings and categorically held a revision application is not maintainable. In the words of the Supreme Court –

"Coming to the question that is raised there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing his order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position, in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot be countenanced. The view taken by us also gain support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer, may refund the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act. Therefore, an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which, if we may term it so, is in the nature of execution of a decree/order. In the case at hand it was specifically mentioned in the order of the Assistant Collector that the assessee may file appeal against the order before the Collector (Appeals) if so advised."

25) Further similar case was considered by the Madras High Court in **Sivananda Pipe Fittings Ltd., Vs Superintendent of Central Excise, Hosur** ^[16]. In the said case the petitioner therein was granted refund by processing the application of petitioner therein under Section 11 B(1) of

the Act. In appeal the appellate authority set aside the communication granting refund. A specific contention was raised that the appellate authority under Section 35A of the Act can merely decide an issue and refer a case to the adjudicating authority and thereafter the procedure contemplated under Section 11A of the Act has to be followed. The ground of limitation was also raised. The learned single Judge after adverting to the respective contentions of the parties had held as follows:

“Para 16. After a careful consideration of the submissions of the learned Counsel appearing on either side in the light of the judicial pronouncements placed before me and the relevant provisions of law and the indisputable material of facts on record, I am of the view that the submissions on behalf of the petitioner have no merit and do not merit countenance in my hands. So far as the decisions of the Apex Court referred to before me are concerned, they had no occasion to deal with or decide the issue that is relevant or raised before me in this case. The observations made were merely on the scope of [Section 11-A](#) and the necessary formalities to be observed and the conditions to be satisfied for invoking the powers under [Section 11-A](#) of the Act. The impact of an interaction of the said provision with the provision contained in [Section 35-A](#) and [Section 35-E](#) was not at all considered in any of the decisions of the Apex Court but were in issue and considered only in the opinion expressed by some of the Tribunals and whereas the branch of the Tribunal at South had taken a view favourable to the Revenue, the Branch of the Tribunal at North took a view supporting the stand point of an assessee-manufacturer. a careful analysis and perusal of the orders of the Tribunal in [Re-rolling Mills v. Collector of Central Excise \(Tribunal\)](#) and [Collector of Central v. Universal Radiators Ltd. \(supra\)](#) would go to show that greater emphasis and effect was given by them only to [Section 11-A](#) at the expense and in derogation of [Section 35-E](#) of the Act and in utter disregard of the jurisdiction of the authority exercising powers under [Section 35-E](#) of the Act. While the orders of the Tribunal proceeded to hold that there is nothing in any part of the Act that can counteract [Section 11-A](#) and that resort to [Section 35-E](#) cannot have the effect of nullifying [Section 11-A](#) and the time limit stipulated therein and that such an interpretation would have the effect of rendering [Section 11-A](#) otiose, they have totally lost sight of the position that dovetailing [Section 11-A](#) into [Section 35-E](#) would equally have the effect of nullifying and making [Section 35-E](#) wholly redundant and would also result in completely obliterating the said provision from the statute itself. Such an interpretation also cannot be said to be a proper or reasonable one.

Para 17. On a careful analysis of the provisions contained in [Sections 11-A](#), [35-A](#) and [35-E](#) it could be seen that the powers conferred are upon different authorities to be exercised in different circumstances and fact situations. [Section 11-A\(1\)](#) of the Act

confers powers upon a Central Excise Officer, in the nature of a review or reconsideration, though the proviso confers powers under certain specified circumstances upon the Collector of Central Excise. It is only the Collector of Appeals who has been conferred powers under [Section 35-A](#) in an appeal filed by an assessee and again under [Section 35-E\(4\)](#) in respect of a proceeding instituted by the department. In view of the above, one provision is not and cannot be also derogatory of the other, either in respect of the power or the authority entrusted with such power under different provisions of the Act. In substance, those provisions are mutually exclusive in their scope, extent and purport only and resort can be had to either one or more than one of such powers depending upon the exigencies of the situation and the exercise of one is not destructive of the other.”

26) Finally, after analyzing various judgments of the Supreme Court, the learned single Judge held as follows:

Para 21. So far as the facts and circumstances of the case are concerned, there is no dispute that the impugned order came to be passed within the six months period visualised under [Section 11-A](#) and that notice of the application filed under [Section 35-E\(4\)](#) was also served upon the petitioner calling upon him also to file his cross objections, if any, and he was fully heard and then orders have been passed and communicated to the petitioner, also. There is no need to follow the procedure prescribed under [Section 11-A](#) once over again. So far as the facts and circumstances of the present case are concerned, it may also be taken that the provisions of [Section 11-A](#) have also been substantially and effectively complied with when the procedure under [Section 35-E](#) has been followed and notices have been issued and no legitimate or real grievance whatsoever could be made by the petitioners. There is also no substance or merit in the plea that the authority exercising power under [Section 35-E\(4\)](#) can only set aside the order of the adjudicating authority and cannot direct refund to the State or order recovery of the amount erroneously refunded. When the very order, as in this case, that is the subject matter in issue in the application filed under [Section 35-E\(4\)](#) is the earlier order of refund passed by the adjudicating authority, and the legality and propriety of passing such an order, while the Collector of Appeals sets aside such an order, the Collector of Appeals shall be entitled as of necessity to direct the return or repayment or recovery of the money erroneously refunded. Such powers are conserved to the Appellate Collector as a necessary and incidental power essential for the effective discharge of the jurisdiction under [Section 35-E\(4\)](#) of the Act. Otherwise, it would be a futile exercise of powers and such a construction cannot be countenanced at all by Courts and render an effective power conferred really purposeless or useless. The impugned order, therefore, does not call for any interference in these proceedings.

27) This judgment of the learned single judge was affirmed by the

Division Bench in **Sivanandha Pipe Fittings Ltd., case** (16 supra). We may notice that the judgment of the Tribunal in **Re Rolling Mills Vs. Collector of Central Excise**^[17], was elaborately dealt with and distinguished. Unfortunately, as pointed out supra the Supreme Court dismissed the appeal of the department against the order of the Tribunal in **Rerolling Mills case** (17 supra) on the concession made by the Department and in that process the judgment of the learned single Judge of the Madras High Court in **Madras Rubber Factory Ltd., case** (3 supra) and the Judgment in **Sivananda Pipe Fittings Ltd., case** (16 supra) both single Judge and Division Bench was not brought to the notice of the Supreme Court.

28) Section 11A of the Act as amended by the Finance Act with retrospective effect may be noticed. By the time the appellate authority came to consider the appeal the amended provision came into existence. A careful reading of the amended provision sets out the scope of Section 11A of the Act. The short levy or short payment or erroneous refund, as the case may be, should be on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the Rules made thereunder. In the facts of the case the refund order was granted ignoring the fact that the duty payable as per the approved list became final on account of not pursuing the protest petition. In other words the grant of refund was not the result of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods. The Tribunal failed to notice the statutory provision in making applicable to the present case. The Supreme Court while interpreting Section 28 of the Act, which was in *pari materia* to the unamended Section 11 of the Act, interpreted the word 'erroneously refunded' as meaning "The expression "erroneously refunded" means refunded by means of an order which is erroneously made" in **Geep Flashlight Industries Ltd., Vs. Union of India and Others**^[18].

29) The judgment of the Madras High Court in **Commissioner of Central Excise, Coimbatore Vs. PRICOL Ltd.**,^[19] also does not support the case of the respondent. A close reading of the same does not indicate any greater reasoning justifying ignoring of the judgment of the Supreme Court in **Asian Paints Case** (6 Supra). Besides that the High Court had relied on the case of **Re Rolling Mills** (12 supra) and also the Board Circular, which have been held to be not applicable. Two orders passed by the Joint Secretary, Government of India, have also been placed before this Court by the learned counsel for the respondent stating they are only meant to be persuading and show the approach of the authorities. A perusal of the orders reveal that in the said orders reliance was placed on **Re Rolling Mills Case** (12 Supra) and **Jain Shudh Vanaspati case** (13 supra). They do not throw any light on the issue.

30) In the light of the discussion above, all the questions are required to be answered in the negative.

31) In the result, the appeal is allowed by answering all the three questions in favour of the revenue and against the assessee. There shall be no order as to costs. Miscellaneous petitions pending, if any, shall also stand closed.

G. CHANDRAIAH, J

CHALLA KODANDA RAM, J

Date:14.08.2015

Note:

L.R copy to be marked.

B/o.

Gk/Ssv.

After pronouncement of the judgment, learned counsel appearing for the respondent/assessee prays for time for payment of the disputed

amount which was refunded erroneously. Considering the fact that the respondent's appeal came to be allowed by the Tribunal, we find the said request to be reasonable and, accordingly, six weeks time from the date of receipt of copy of this order is granted for payment of the amount which has been erroneously refunded.

G. CHANDRAIAH, J

CHALLA KODANDA RAM, J

**HON'BLE SRI JUSTICE G. CHANDRAIAH
AND
HON'BLE SRI JUSTICE CHALLA KODANDA RAM**

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C.E.A. No.17 OF 2005

Date:14.08.2015.

Gk/Ssv.

[1] 2008 (13) SCC 1
[2] 2012 3 SCC 518
[3] (1981) 8 ELT 565 (Madras)
[4] 2000 6 SCC 650
[5] 1997 (90) ELT 260 (SC)
[6] 2002 (142) ELT 522 (SC)
[7] 2002 (143) E.L.T 247 (SC)
[8] 2004(168) ELT 145 (SC)
[9] (1997) 5 SCC 536
[10] 2015(319)ELT598(S.C)
[11] 2002 (145) ELT 168
[12] 1989 (43)ELT 115 (Tri)
[13] (1996) 10 Supreme Court Cases 520
[14] 2011 (271) ELT 164 SC
[15] 1996 (87) ELT 19 SC
[16] 1998 (97) ELT 52 Madras
[17] 1989 (43) ELT 115 (Tri)
[18] (1976) 4 SCC 677
[19] 2015 (320) ELT 703 (Mad)