

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.4.2017

C O R A M :

The Honourable Mr. Justice S.Manikumar
and
The Honourable Mr. Justice D.Krishnakumar

Civil Miscellaneous Appeal Nos. 1204 & 1205 of 2016
and
C.M.P Nos. 9103 to 9105 of 2016

Commissioner of Customs
"Customs House"
No.60, Rajaji Salai
Chennai - 600 001.

.... Appellant /Respondent in
both CMAs

Vs.

1. M/s. Chemplast Sanmar
No.9, Cathedral Road
Chennai - 600 086.

....1st Respondent/Appellant

2. The Customs, Excise and Service Tax
Appellate Tribunal, South Zone Bench
No.26 Shasthri Bhavan
Haddows Road
Chennai - 600 006.

...2nd Respondent/
2nd Respondent in
both CMAs

Common Prayer: Appeals filed under Section 130 of Customs Act, 1962, against the common final order Nos.41589/2015 41590/2015 dated 02.06.2015 passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Chennai.

For appellant : Mr. V. Sundareswaran, SPC

For 1st respondent : Mr. Vijayaraghavan,
Senior Counsel
for M/s.Anand Sasidharan

J U D G M E N T

(Judgment of the Court was made by D. Krishnakumar,J)

The Revenue has filed these Appeals against the common final order in No. 41589 and 41590 of 2015 dated 02.06.2015 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

2. The facts of the case as narrated in the appeal, is as follows :-

The assessee respondent company filed an application for registration of their project contract for import of Plant and Machinery for combined cycle power project in terms of project import regulations vide Not.No.133/ 85 dated 19.04.1985 to set up captive power plant to provide power to their own PVC factory at Mettur Dam and Industrial Alcohol Factory located in Krishnagiri and Panruti. The said Notification was replaced by new project implementation regulations in Notification No. 306/86 dated 05.05.1986 as follows :-

133/85 -Customs, In the said notification, the
dated the 19th following Explanation shall be
April 1985. inserted at the end, namely :-

"Explanation :-- For the purpose of this notification, the expression "power projects (including gas turbine power projects)" shall mean such projects whose output or end product is power, but shall not include captive power plants set up by units engaged in activities other than power generation."

The benefit of exemption was denied to the assessee company, since the assessee company proposed to set up captive power plant, to provide power to their own factory and so 30% basic customs duty was charged. Since the assessee company was in urgent need of power, the same was paid under protest.

3. On 12.01.1987, the assessee company preferred a refund application for Rs.1,50,99,362.95. Since the department did not sanction their refund claim, the assessee company filed W.P. Nos. 4566 & 4567 of 1987, praying for a Writ of Declaration, declaring that the explanation added by Notification No.306/86 to Notification No.133/85 dated 19.04.1985 is unconstitutional, void and ultra vires of the Customs Act, 1962; Writ of Mandamus directing the department to assess the goods imported by the Respondent under Projects

Contract No.S37/186/86 Gr.E for power projects under Tariff 98.01 read with Notification No.133/85; and to direct the department to refund the customs duty collected in excess of 25% on the goods imported by the respondent under Project Import Registration No.S37/186/86 Gr.E. By order dated 02.03.1995, allowing both the writ petitions, this Court quashed the latter part of the Notification No.306/86 denying the benefits of Notification No.133/85 to captive power plants. Based on the said order, the assessee company sent a letter dated 14.09.1995 to the Assistant Commissioner, Gr.E., seeking refund of a sum of Rs.1,50,99,362.95. Against the aforesaid order, the department preferred appeals in W.A. No. 358 & 359 of 1997. Since his representation dated 14.09.1995 was not replied, the assessee company filed a writ petition in W.P.No.5299 of 1998 seeking to implement the orders of this Court and grant refund of Rs.1,50,99,362.95 being the duty collected in excess of 25%, on the goods imported by the assessee company under Project Imports Registration No.S37/186/ 86 Gr.E, in terms of the refund application filed by the company, immediately, along with interest @ 16% p.a., from 02.06.1995 till the date of payment. This is a second writ petition filed by the assessee company. By an order dated 11.11.1998, this Court disposed of W.P. No.5299 of 1998 holding that since no stay was granted by the Division Bench of this Court, in the Writ Appeals filed by the department, the department was directed to carry out the directions of the learned Single Judge in W.P. Nos. 4566 and 4567 of 1987 and further directed the department to consider and dispose of the application for refund of the said amount to the petitioner, within a period of four weeks from the date of receipt of the order copy or from the date of production of a copy of the order.

4. Against the aforesaid order passed by the Writ Court, the department filed an appeal in W.A. No.1686 of 1998 before this Court. However, on 17.07.2000, the earlier Writ Appeal Nos. 358 and 359 of 1997 filed by the department were dismissed. As no further appeal was preferred against the order dated 02.03.1995 in W.P. Nos.4566 and 4567 of 1987, the said order became final and so the appeal filed by the department in W.A. No.1686/1998 was dismissed on 13.10.2008, with a direction to the respondents to consider and dispose of the representation of the assessee, for refund of the said amount within a period of two weeks from the date of receipt of a copy of the order or from the date of production of the said order. However, the department filed a Review Application in Rev. Appl. No.128/09, seeking review of its order dated 13.10.2008 on the ground that the assessee company is not entitled to the benefit of the exemption and also stating that the decision of the Hon'ble Supreme Court in the case of Indian Charge Chrome is in favour of the department, wherein the notification No.306 of 1986 has been upheld. The Review Application was also dismissed on

08.10.2009 observing that when the Administration is required to dispose of the representation of the assessee company, they could very well consider and dispose of the representation on merits and in accordance with law and instead of complying with the directions of the learned Single Judge and Division Bench concurrently, the Administration is gaining time by filing these type of applications. Subsequently, the Deputy Commissioner of Customs (Refunds), Chennai passed an Order in Original No.15603/2011 dated 08.04.2011, holding that the assessee company is entitled to a refund of Rs.3,83,83,821/- being the refund amount of Rs.1,50,99,363/- together with interest and the same was also refunded by the department. Based on the orders of the Commissioner of Customs (Exports) in Review No.429/2011 dated 22.07.2011, the department preferred an appeal before the Commissioner (Appeals) on the ground of "unjust enrichment" and more particularly in the light of the decision of the Hon'ble Supreme Court in 2005 (181) ELT 328 (Shahakari Khand Udyog Mandal Ltd. vs. Commissioner). In Union of India vs. Indian Charge Chrome reported in 1999 (112) ELT 753 (SC) the Hon'ble Supreme Court had upheld that vires of Notification No.30619/86 dated 01.05.1986. Further, a show cause-cum-demand notice No.F. No.S24/MAN/791/11-Ref dated 04.08.2011, calling upon the assessee company to show cause as to why the erroneously refunded amount of Rs.3,83,83,821/- should not be recovered from them, along with interest. Pursuant to the said show cause notice, the assessee company refunded a sum of Rs.4,10,90,669/- on 02.09.2011, under protest. However, the assessee company filed W.P. No.23149 of 2011 before this Court and obtained an order of stay of the show cause proceedings, on 12.10.2011. The appeal of the department was allowed by the Commissioner (Appeals) in IOA C.Cus.No.5 of 2013 on 08.01.2013, holding that the assessee company is not eligible for the benefit under Notification 133/85-Cus. read with notification No.306/86 and the subsequent refund, notwithstanding the fact that the same was ordered by this Court. Aggrieved by the said order of the Commissioner of Customs (Appeals), Chennai, the assessee company as well as the department, filed appeals before the Customs, Excise & Service Tax Appellate Tribunal. On 02.06.2015, the Tribunal passed a common order in No.41589 and 41590 of 2015, holding that the assessee company is eligible to the benefits of the notification and the refund having been made pursuant to the orders of this Court, cannot be reopened without challenging the said order.

5. Learned counsel appearing for the appellant department would submit that the respondent company imported the Combined Cycle Power Project through various shipments and claimed benefits of Notification No.133/85, granting exemption for goods under 84.66 imported into India for power projects. Subsequently, Notification No.306/86 dated 01.05.1986, was issued under Section 25(1) of Customs Act, 1962 excluding

captive power plants engaged in activities other than power generations by adding explanation. Based on that notification, the appellant department denied the benefits claimed under the Notification No.133/85 to the respondent company. Since the refund application of the respondent company dated 12.01.1987, was not considered by the appellant department, the writ petitions in W.P. Nos. 4566 and 4567 of 1987 dated 02.03.1995, were filed by the respondent company challenging the explanation in Notification No.306/86 dated 01.05.1986 to Notification No.133/85 dated 19.04.1985. Since the writ petitions were allowed holding that the respondent company is entitled for exemption, a representation dated 14.09.1995 submitted for refund of Rs.1,50,99,362.95 along with interest @ 16% per annum from 02.06.1995 till the date of payment. Subsequent to filing of appeals and petitions by both parties and based on the judicial and departmental orders, now the appellant department is on appeal before this Court, challenging the order of the CESTAT dated 02.06.2015, on various grounds.

6. It is stated by the learned counsel for the appellant department that the order dated 02.03.1995 was passed following the decision of the Hon'ble High Court of Orissa in the case of Indian Charge Chrome Vs. Union of India, reported in 1994 (72) ELT 538 (Ori.), but the same has been subsequently reversed by the Hon'ble Apex Court Union of India vs. Indian Charge Chrome reported in 1999 (112) ELT 753 (SC). The Tribunal has not appreciated the case of the department that once the Apex Court has upheld the vires of the explanation in Notification No.306/86 dated 01.05.1986 to Notification No.133/85 dated 19.04.1985, it is the law under Article 141 of the Constitution of India, which binds all persons including those who had not challenged the notification. Further, the declaration of law by the Hon'ble Supreme Court in the above said case is binding on all Courts, authorities and persons, notwithstanding the fact that no appeal was filed against the Writ Appeal Nos. 358 and 359 of 1997. The impugned order issued by the appellant department, with regard to unjust enrichment is valid in law, in the light of the decision of the Hon'ble Apex Court in the case of Union of India vs. Indian Charge Chrome reported in 1999 (112) ELT 753 (SC). Eventhough the appellant department has complied with the order passed by this Court in W.P. Nos.4566 and 4567 of 1987, confirmed in W.A. Nos. 358 and 359 of 1997, as per the provisions under Section 27 of the Customs Act, 1962, claims that the Order in Original No.15603/2011 dated 08.04.2011 passed by the Deputy Commissioner of Customs (Refunds) Chennai, directing them to refund Rs.3,83,83,821/- is erroneous. Based on the show cause notice dated 04.08.2011 the said amount has also been remitted back by the respondent company. Therefore, the order passed by the Department is perfectly valid in law and the order passed by the Tribunal is liable to be set aside.

7. Per contra, learned counsel for the respondent company would submit that Writ Petition Nos.4577 and 4567 of 1987 were filed by the respondent company, challenging the explanation added by Notification No.306/86 to Notification No.133/85 before this Court and by order dated 02.03.1995 the writ petitions were allowed and the latter part of the said Notification No.306/86 denying the benefits of Notification No.133/85 to captive power plants was quashed. Hence, the respondent company is entitled for refund of the excess duty paid. Eventhough, the appellant department had filed appeals before this Court and the Commissioner, the same were dismissed. The petition in W.P.No.5299 of 1998 was filed by the respondent company, seeking to give effect to the orders of this Court dated 02.03.1995 and to grant refund of the excess duty of 25% and by order dated 11.11.1998 this Court was pleased to pass an order directing the department to consider and dispose of the representation of the respondent company for refund, within a period of four weeks. Against the said order a Writ Appeal was filed in W.A. No.1686 of 1998 by the department and the same was also dismissed by this Court. The Review Application filed against the appeal was also dismissed on 08.10.2009. Since no Special Leave Petition was filed by the appellant department, the above said order has become final. Subsequently, the appellant department has also refunded the sum of Rs.3,83,83,821/- to the respondent company. After compliance of the order passed by this Court, the appellant department issued a show cause cum demand notice F.No.S24/MAN/791/11-Ref dated 04.08.2011, to the respondent company calling upon to recover the amount that has been erroneously refunded vide order dated 08.04.2011. Learned counsel for the respondent company would submit that the refund made by the department, is implementation of the order of this Court and if there is any legal impediment to implement the order, the appellant department should have filed an appeal on the said order. Without exhausting the available remedy as against the refund of duty amount, the act of the appellant department by issuing a show cause notice and directing the respondent company to remit back the amount, would amount to contempt of court. Learned counsel further submitted that excess duty was paid to clear the goods and the refund amount was remitted back to the appellant department, only under protest. The appeal filed by the respondent company before the Commissioner of Customs (Appeals) was dismissed on 08.01.2013, on account of the order passed by this Court.

8. Aggrieved by the said order, the respondent company and the appellant department filed an appeal before the Tribunal. The appeal filed by the appellant department was dismissed by the Tribunal holding that the refund of the duty have been made, pursuant to the orders passed by this High Court in the above said writ petitions and writ appeals. Therefore,

the order of the Tribunal is perfectly valid in law and does not warrant any interference with the order passed by the Tribunal, in the above appeals.

9. Heard Mr. V. Sundareswaran, Senior Panel Counsel for the appellant department and Mr. Vijayaraghavan, learned Senior Counsel for the respondent company and perused the materials placed before this Court.

10. While admitting these appeals, the following substantial questions of law, were framed by this Court.

- 1) Whether the Tribunal was correct in directing the refund of Rs.4,10,90,669/- to the respondent ignoring the law laid down by the Apex Court in 1999 (112) ELT 753 dated 25.06.1999.
- 2) Whether the Tribunal was correct in ignoring the law that the declaration of law by the Apex Court dated 25.06.1999 in 1999 (112) ELT 753 upholding the vires of Notification No.306/1986 dated 01.05.1986 binds all Tribunals, Courts, authorities and persons notwithstanding that no appeal was filed against W.A. Nos. 358 & 359 of 2000 dated 17.07.2000.
- 3) Whether the Tribunal was correct in not considering the appeal filed by the appellant challenging the direction to refund the amount on the ground of "unjust enrichment" more particularly in the light of the decision of the Apex Court in 2005 (181) ELT 328 (Shahakari Khand Udyog Mandal Ltd. vs. Commissioner).
- 4) Whether the Tribunal was justified in allowing the appeal without any discussion or reasoning objectively or subjectively with regards to the plea raised of non-discharge of burden of passing on the duty ("unjust enrichment").

11. The point for consideration is whether the order dated 08.04.2011, passed by the Deputy Commissioner of Customs (Refunds), Chennai can be reversed by the Commissioner of Customs (Appeals), in the light of the decision rendered by the Hon'ble Supreme Court in Union of India vs. Indian Charge Chrome reported in 1999 (112) ELT 753 (SC). It is an admitted fact that the respondent company filed W.P. Nos. 4566 and 4567 of 1987 challenging the explanation added by Notification No.306/86 to Notification No.133/85 dated 19.04.1985 as unconstitutional, void and ultra vires of the Customs Act 1962 and also sought for a Mandamus directing the department to assess the goods imported by the Respondent under Projects Contract No.S37/186/86 Gr.E for power projects under Tariff 98.01 read with Notification No.133/85.

12. As stated in the earlier paragraphs, the writ appeals filed by the appellant department and the Review Application in No.128/09 were dismissed by this Court and the same has become final. No Special Leave Petition has been preferred by the appellant department. While the show cause proceedings have been stayed in M.P. No.2 of 2011, the main W.P. No.23149 of 2011 filed by the respondent company is pending before this Court. The same is not disputed. Pursuant to the orders passed by this Court in the aforesaid writ petitions, writ appeals and the review application, the Deputy Commissioner of Customs (Refunds) passed the order in Original No.15603/2011 dated 08.04.2011, which reads as follows :-

" I order for the sanction of Rs.1,50,99,363/- against excess duty paid and Rs.2,32,84,458/- as interest which in total works out to Rs.3,83,83,821/- (Rupees Three Crores Eighty Three Lakhs Eighty Three Thousand Eight Hundred and Twenty One Only) as refund under Section 27 of the Customs Act, 1962 to the claimant M/s. Chemplast Sanmar Ltd., which was paid in respect of the B/E's as mentioned supra".

The Commissioner of Appeals reversed the order of the Original Authority and passed a detailed order by relying upon the decision of the Hon'ble Supreme Court in the case of Union of India vs. Indian Charge Chrome, cited supra, wherein, in paragraphs 15 & 16, the Apex Court held as under:-

" 15. We agree with the learned senior counsel for the appellants in his submission that the exemption granted by the Notification No. 133/85 related to the goods falling under the Heading No. 84.66 of the First Schedule to the Customs Tariff Act, 1975 imported into India for power projects (including gas turbine power projects) the end product whereof was electricity meant for public distribution and therefore the amendment notification (No. 306/86) dated 1.5.1986 was only clarificatory in nature. It only clarified that the full exemption from payment of customs duty as granted by the Central Government by Notification No. 133/85 was not intended to apply to such power plants which were set up by units engaged in activities other than power generation and which generated power for captive consumption. The words used in the Notification No. 133/85 were - "Power Projects (including gas turbine Power Projects)". A power plant is not the same thing as a power project. Chamber's 20th Century Dictionary defines Project as "a proposal for undertaking: an undertaking."

Plant is defined as "equipment, machinery, apparatus for an industrial activity." The distinction between the two terms is determinable by reference to mass, magnitude or extent of the two. 'Project' suggests something very much more extensive than a 'plant'. The learned senior counsel for the appellants is right in submitting that "power project" could not have meant "power plant" also and the scope for confusion or doubts, if any, was done away with by inserting a clarification. Thus the amendment notification was clarificatory merely.

16. In *Kasinka Trading and Anr. v. Union of India and Anr.*'s case (*supra*) this Court has held that the power of exemption under Section 25 (1) of the Act has been granted to the Government by the Legislature with a view to enabling it to regulate, control and promote the industries and industrial productions in the country. Where the Government on the basis of the material available before it is satisfied bonafide that the public interest would be served by either granting exemption or by withdrawing, modifying or rescinding an exemption already granted it should be allowed a free hand to do so. What was given in public interest can also be curtailed in public interest. Individual interest must yield in favour of societal interest. In the case at hand we find the respondent in its writ petition having laid challenge to the validity of the amendment notification on the ground of invidious discrimination but there is no plea raised that formation of opinion as to public interest was based on no material or was vitiated by malafides."

It has been held that the Government can issue clarifications, notifications without discriminating any class of goods or person, it is established beyond doubt that the respondent are not eligible for the benefit under notification No.133/85 read with notification 306/86 and subsequent refund, not withstanding the fact that the same was ordered by the Hon'ble High Court of Madras.

13. The Appellate Tribunal by its order dated 02.06.2015 in Final Order Nos. 41589 and 41590 of 2015 has held as follows :-

" 27. ... Revenue having lost their appeal remedy against the Hon'ble High Court orders dated 17.07.2000 and 08.10.2009 cannot take shelter by reviewing the order of the adjudicating authority

by citing the case law of Union of India vs. Indian Charge Chrome (supra). It is settled law by the Apex Court that the department cannot reopen the case which is settled by the jurisdictional High Courts without setting aside the Hon'ble High Court Order by the Apex Court in so far as the particular appellant who succeeded their writ petition. The order of LAA setting aside the DC's order sanctioning the refund and interest, in compliance of High Court's order, is not justified and not in conformity with the law. Further, the LAA knowing fully well that the said refund was sanctioned as per the Hon'ble High Court's order and holding it as erroneous refund is not warranted and it amounts to judicial impropriety as the Hon'ble High Court order is binding on all subordinate authorities including LAA and the Tribunal. Revenue filing appeal against the impugned order on the unjust enrichment also is not justified.

28. Before parting the case, we would like to state that it was brought to our notice that appellant had returned the amount sanctioned as refund suo motu 'under protest' along with interest to the tune of Rs.4,10,90,669/- under TR challan dated 2.9.2011 which stands deposited in the government exchequer. We are of the view that when there is no stay granted by any higher court on the refund order of adjudicating authority, depositing the refund already sanctioned in compliance of High Court's order is unwarranted. Keeping judicial discipline in view and this case having gone through a record of '7' Hon'ble High Court orders, we direct the revenue to return the amount due to the assessee without any further delay. Accordingly, we reject the Revenue appeal and allow the assessee's appeal with consequential benefit."

14. Therefore, the present appeal has been filed by the appellant department mainly on the ground that the Hon'ble Apex Court in Union of India vs. Indian Charge Chrome (1999 (112) ELT 753 S.C.) has upheld the notification issued in Notification No.133/85 and observed that it is only an amendment notification for clarification. Therefore, the decision relied upon by this Court namely Indian Charge Chrome Ltd. Vs. Union of India reported in 1994(72) ELT 538 (Ori.) while allowing the writ petitions in W.P.Nos.4566 & 4567 of 1987 would not stand in the eye of law. Therefore, the former judgment of the Apex Court binding on all the persons under Section 141 of the Constitution

of India.

15. In the case of M/s. Shenoy & Company vs. Commercial Tax Officer, reported in 1985 (21) ELT 14 (SC), the Hon'ble Supreme Court has held that under Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India. In paragraphs 16 & 17 it is observed as follows :-

" 16. In our opinion , both these decisions lay down identical (1) [1969] I S.C.R. 103. principles and there is nothing to distinguish between the two. In the earlier case , this Court , on its facts , overruled the preliminary objection that absence of appeals against the three petitioners left out , would not render the appeal before this Court incompetent , holding thereby that the effect of the decision in that appeal would be binding on the appellant therein. In the latter case , this Court in unmistakable terms laid down that the law laid down in the earlier case , namely , Triloknath's case , applied even to those who were not parties to the case. These two decision were given by two Constitution Benches of this Court. We find that Joginder Singh's case was not noted by the Bench that decided Makhanlal Waza's case. This does not create any difficulty. As we have already held , the two decisions , on the principles laid down by them , speak the same voice , i.e. that the law laid down by the Supreme Court is binding on all , notwithstanding the fact that it is against the State or a private party and that it is binding on even those who were not parties before the Court. Since it is necessary to make the position of law clear and free from ambiguity , we would set out our reasons for our conclusion clearly.

17. Though a large number of writ petitions were filed challenging the Act , all those writ petitions were grouped together , heard together and were disposed of by the High Court by a common Judgment. No petitioner advanced any contention peculiar or individual to his petition, not common to others. To be precise , the dispute in the cause or controversy between the State and each petitioner had no personal or individual element in it or anything personal or peculiar to each petitioner. The challenge to the

constitutional validity of 1979 Act proceeded on identical grounds common to all petitioners. This challenge was accepted by the High Court by a common Judgment and it was this common Judgment that was the subject matter of appeal before this Court in Hansa Corporation's case. When the Supreme Court repelled the challenge and held the Act constitutionally valid, it in terms disposed of not the appeal in Hansa Corporation's case alone, but all petitions in which the High Court issued mandamus on the none existent ground that the 1979 Act was constitutionally invalid. It is, therefore, idle to contend that the law laid down by this Court in that Judgment would bind only the Hansa Corporation and not the other petitioners against whom the State of Karnataka had not filed any appeal. To do so is to ignore the binding nature of a Judgment of this Court under Article 141 of the Constitution. Article 141 reads as follows:

"The law declared by the Supreme Court shall be binding on all courts within the territory of India "

A mere reading of this Article brings into sharp focus its expanse and its all pervasive nature. In cases like this, where numerous petitions are disposed of by a common Judgment and only one appeal is filed, the parties to the common Judgment could very well have and should have intervened and could have requested the Court to hear them also. They cannot be heard to say that the decision was taken by this Court behind their back or profess a ignorance of the fact that an appeal had been filed by the State against the common Judgment. We would like to observe that, in the fitness of things, it would be desirable that the State Government also took out publication in such cases to alert parties bound by the Judgment, of the fact that an appeal had been preferred before this Court by them. We do not find fault with the State for having filed only one appeal. It is, of course, an economizing procedure."

In paragraphs 18, 19 & 20, it is discussed regarding the nature of Mandamus, which is extracted below :-

" 18.

To contend that this conclusion applies only to the party before this Court is to destroy the efficacy and integrity of the Judgment and to make the mandate of Article 141 illusory. By setting aside the common Judgment of the High Court , the mandamus issued by the High Court is rendered ineffective not only in one case but in all cases.

19. A writ or an order in the nature of mandamus has always been understood to mean a command issuing from the Court , competent to do the same , to a public servant amongst others , to perform a duty attaching to the office , failure to perform which leads to the initiation of action. In this case, the petitioners-appellants assert that the mandamus in their case was issued by the High Court commanding the authority to desist or forbear from enforcing the provisions of an Act which was not validly enacted. In other words , a writ of mandamus was predicated upon the view that the High Court took that the 1979 Act was constitutionally invalid. Consequently the court directed the authorities under the said Act to forbear from enforcing the provisions of the Act qua the petitioners. The Act was subsequently declared constitutionally valid by this Court. The Act , therefore , was under an eclipse , for a short duration; but with the declaration of the law by this Court , the temporary shadow cast on it by the mandamus disappeared and the Act revived with its full figure , the constitutional invalidity held by the High Court having been removed by the Judgment of this Court. If the law so declared invalid is held constitutionally valid , effective and binding by the Supreme Court , the mandamus for bearing the authorities from enforcing its provisions would become ineffective and the authorities cannot be compelled to perform a negative duty. The declaration of the law is binding on everyone and it is therefore , futile to contend that the mandamus would survive in favour of those parties against whom appeals were not filed.

20. The fallacy of the argument can be better

illustrated by looking at the submissions made from a slightly different angle. Assume for arguments sake that the mandamus in favour of the appellants survived notwithstanding the Judgment of this Court. How do they enforce the mandamus ? The normal procedure is to move the Court in contempt when the parties against whom man damus is issued disrespect it. Supposing contempt petitions are filed and notices are issued to the State. The State's answer to the Court will be: "Can I be punished for disrespecting the mandamus, when the law of the land has been laid down by the Supreme Court against the mandamus issued , which law is equally binding on me and on you ?". Which Court can punish a party for contempt under these circumstances ? The answer can be only in the negative because the mandamus issued by the High Court becomes ineffective and unenforceable when the basis on which it was issued falls , by the declaration by the Supreme Court , of the validity of 1979 Act."

16. With regard to the present case on hand, challenging the orders passed in the W.P. Nos. 4566 & 4567 of 1987 and 5299 of 1998, Writ Appeals have been filed by the appellant department, which were dismissed. Challenging W.A. No.1686 of 1998, a Review was filed and the same was also dismissed by this Court. So, the appellant department has refunded a sum of Rs.3,83,83,821/- to the respondent company. Therefore, the order of this Court has become final and no Special Leave Petition has been preferred by the appellant department.

17. In view of the above, the original authority has held that the respondent company was entitled to the refund of Rs.1,50,99,363/- together with interest of Rs.2,32,84,458/- (totally amounting to Rs.3,83,83,821/-). So, it is clear that the appellant department had accepted and complied with the order passed by this Court in the above Writ Petitions and had refunded the above said amount to the respondent company. However, pursuant to the refund of the above said amount to the respondent company, the appellant department has issued a show cause cum demand notice dated 04.08.2011 to the respondent company under Section 28 of the Customs Act, calling upon the respondent company to show cause as to why, the erroneously refunded amount of Rs.3,83,83,821/- should not be recovered from the respondent with interest.

18. Challenging the said show cause notice, the respondent company filed W.P. No. 23149 of 2011 and this Court granted stay on 12.10.2011 in M.P.No.2 of 2011 and the writ petition is still pending. Therefore, the subject matter of refund of excess duty under the provisions of the Act, which is the subject matter of this appeal, is pending before this Court.

19. So, it is to be considered as to whether the order passed in OIO No.15603/2011 dated 08.04.2011 requires to be considered by this Court, in the light of the facts stated supra. In the said order, it is clearly observed that,

' In view of the foregoing reasons and as also the issue has been finally settled by the Hon'ble High Court and the order has been accepted by the Department. The refund of Excess Duty so paid of Rs.1,50,99,363/- along with the interest as calculated above, which works out to Rs.2,32,84,458/- which is in total Rs.3,83,83,821/- is admissible. Hence, I pass the following order.'

Against the said order, the Commissioner of Customs (Appeals), Chennai has allowed the department appeal for the reasons that it is established beyond doubt that the respondent company are not eligible for the benefit under notification 133/85 read with notification 306/86 and for the subsequent refund.

20. The appeal filed by the respondent company before the Customs, Excise & Service Tax Appellate Tribunal was allowed, considering the orders passed by this Court in the Writ Petitions and Writ Appeals. The Review Application was dismissed, wherein it was held as below :-

"3. Now, by virtue of this review application, the Administration is requiring us to pass orders on the representation submitted by the writ petitioner and to reject the same. It is an unfortunate situation, wherein the Administration by virtue of this review application is seeking orders of rejection of the representation submitted by the writ petitioner. When the Administration is required to dispose of the representation of the petitioner, they could very well consider all the facts and circumstances of the case and dispose of the representation on merits and in accordance with law. Instead of complying with the direction concurrently issued by the learned Single Judge and also by the Division bench in the writ appeal, the

Administration is gaining time by filing this type of frivolous and vexatious litigations, besides seeks us to exercise their duties. Hence, we see no reason to entertain the review application and accordingly, the same is dismissed. However, there will be no order as to costs."

Consequent to this Court order, no SLP was filed before the Hon'ble Supreme Court, by the appellant department.

21. In the case of Ishwar Dutt vs. Land Acquisition Collector & anr. reported in (2005) 7 SCC 190, in paragraphs 29 and 30 the Hon'ble Supreme Court has observed as follows :-

" 29. Furthermore, a writ of mandamus is required to be obeyed unless a judgment is overruled or a legislation by way of validating statute is brought into force.

30. In Madan Mohan Pathak and Anr v. Union of India and Ors., the Constitution Bench observed: (SCC p.67, para 9) "Here, the judgment given by the Calcutta High Court, which is relied upon by the petitioners, is not a mere declaratory judgment holding an impost or tax to be invalid, so that a validation statute can remove the defect pointed out by the judgment amending the law with retrospective effect and validate such impost or tax. But it is a judgment giving effect to the right of the petitioners to annual cash bonus under the Settlement by issuing a writ of mandamus directing the Life Insurance Corporation to pay the amount of such bonus. If by reason of retrospective alteration of the factual or legal situation, the judgment is rendered erroneous, the remedy may be by way of appeal or review, but so long as the judgment stands, it cannot be disregarded or ignored and it must be obeyed by the Life Insurance Corporation. We are, therefore, of the view that, in any event, irrespective of whether the impugned Act is constitutionally valid or not, the Life Insurance Corporation is bound to obey the writ of mandamus issued by the Calcutta High Court and to pay annual cash bonus for the year April 1, 1975 to March 31, 1976 to Class III and Class IV employees."

In another decision of the Hon'ble Supreme Court in the case of RBF RIG Corporation vs. CC (Imports) Mumbai, reported in 2011 (264) ELT 486 (SC), in paragraphs 19, 20 and 21, it is held as follows :-

"19. We hasten to add, if for any reason, the subordinate authority is of the view that the directions issued by the Court is contrary to statutory provision or well established principles of law, it can approach the same Court with necessary application/petition for clarification or modification or approach the superior forum for appropriate reliefs. In the present case, as we have already noticed, the respondents have not questioned the order passed by the High Court, which order has reached finality. In such circumstances, we cannot permit the adjudicating authority to circumvent the order passed by the High Court.

20. Therefore, in our view, the refund claim of appellant has been erroneously rejected by the Deputy Commissioner of Customs vide its order dated 23.12.2014 ignoring the specific directions issued by the Delhi High Court vide its order dated 11.03.2003, to the customs authorities to dispose of the appellant's claim of refund by taking into consideration the Essentiality Certificates issued by the DGH. The Deputy Commissioner of Customs has rejected the refund claim of appellant on the ground of unjust enrichment and failure to challenge the assessment of the Bills of Entry at the appellate stage, without even considering the Essentiality Certificates in the light of specific and binding directions of the High Court.

21. In view of the above, we allow this appeal and direct the Customs authorities to consider the appellant's claim of refund of customs duty paid under protest in accordance with the directions issued by Delhi High Court vide its order dated 11.03.2003 as expeditiously as possible. In the facts and circumstances of the case, we direct the parties to bear their own costs."

22. As per the decisions of the Hon'ble Supreme Court cited supra, the appellant department was unsuccessful in their appeal remedy against the orders passed by this Court on 17.07.2000 in Writ Appeal Nos. 358 and 359 of 1997 and in Rev. A. No.128 of 2009 dated 08.10.2009 and could not take shelter by reviewing the earlier order of the adjudicating authority, in

light of the decision rendered in the case of Union of India Vs. Indian Charge Chrome, even though the appellant department has raised one of the grounds that the Hon'ble Supreme Court has upheld the Notification No.306 of 1986. The Deputy Commissioner of Customs (Refunds) has also passed the order dated 08.04.2011, which is also the subject matter of refund of the excess duty to the respondent company. In view of the fact that the order passed by this Court has attained finality and the same was complied by the appellant department, now, the department cannot re-agitate the matter in the present appeal.

23. Whiles, a parallel proceedings has been initiated by the appellant department, by issuing a show cause cum demand notice dated 04.08.2011, wherein the Deputy Commissioner of Customs (Refunds) have also relied upon the decisions of the Hon'ble Supreme Court in the case of Union of India vs. India Charge Chrome (cited supra) and also the case of Gammon India Ltd., vs. Commissioner of Customs, Mumbai reported in [2011 (269) ELT 289 (SC)]. The aforesaid notice has been issued to the respondent company, to show cause as to why the erroneously refunded amount should not be recovered, in accordance with the provision of Section 28 of the Customs Act, 1962. The said proceedings are also under challenge before this Court in W.P. No.23149 of 2011 and interim stay has been granted on 12.10.2011.

24. Therefore, we are of the view that the appellant department cannot take two parallel proceedings for the same issue i.e. Challenging the erroneously refunded duty amount by the appellant department to the respondent company. As the appellant department was unsuccessful in the earlier litigations before this Court in Writ Petitions, Writ Appeals and Review Applications, the subject matter in the instant appeal, the order passed by the Deputy Commissioner of Customs (Refunds), Chennai in Order in Original No.15603 of 2011 dated 08.04.2011. Hence, the Tribunal has rightly allowed the appeal filed by the respondent company and had dismissed the appeal filed by the appellant department and the same does not warrant any interference by this Court. It is made clear that we have not expressed any opinion with regard to the legality of the Writ Petition, pending before the Writ Court in W.P. No. 23149 of 2011, challenging the show cause cum demand notice dated 04.08.2011.

25. In view of the aforesaid discussions and decisions, we are not inclined to interfere with the final order Nos.41589/2015 41590/2015 dated 02.06.2015 passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Chennai. So, the substantial questions of law is answered against the appellant Revenue, without being influenced by any of the observations made in the order, it is open to the parties

to raise the legal grounds in the writ court.

26. With the above observation, both the Civil Miscellaneous Appeals are dismissed. No order as to costs. Consequently, the connected Miscellaneous Petitions are closed.

-s/d-
Assistant Registrar((CSVIII)

True Copy

Sub-Assistant Registrar

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To
The Customs, Excise & Service Tax Appellate Tribunal
Chennai.

+2 cc to M/s.Anand Sasidharan Advocate sr 23223 & 23224

C.M.A. Nos.1204
and 1205 of 2016
and
C.M.P Nos. 9103 to
9105 of 2016

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