

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.03.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

CMA No.1034 of 2009

The Commissioner of Central Excise and
Service Tax

Large Taxpayer Unit,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai - 600 101.

.... Appellant

vs.

1. M/s.Apex Laboratories,
38, C.P.Ramasamy Road,
Alwarpet, Chennai - 600 018.

2. Customs, Excise and Service Tax Appellate
Tribunal, South Zonal Bench,
Shastri Bhawan, Annexe, 1st Floor,
26, Haddows Road,
Chennai - 600 006.

.... Respondents

Civil Miscellaneous Appeal filed under Section 35G of the
Central Excise Act, 1944, praying to set aside the Final Order
No.1033 of 2008 dated 23.09.2008 passed by Customs, Excise &
Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.A.P.Srinivas
For Respondents : No appearance (for R1)

JUDGMENT

(Order of the Court was delivered by S.MANIKUMAR, J)

Though, M/s.Apex Laboratories, Chennai, 1st respondent has
been served and name is shown, there is no appearance either in
person or through pleader.

2. Instant Civil Miscellaneous Appeal is filed against the
Final Order No.1033 of 2008 dated 23.09.2008, on the file of the
CESTAT, Chennai, on the following substantial questions of law.

"(i) Whether the 2nd respondent was right in

holding that the doctrine of unjust enrichment was not applicable to any claim for refund of duty consequential to finalization of provisional assessment for any period prior to 25.06.99, as the refund claim in the subject case was consequent to finalization of Provisional Assessment on 30.10.2000 for the period 1998-99 especially considering that the amendment to Section 11B of Central Excise Act, 1944 was brought with effect from 01.08.98 whereby refund consequent to finalization after 01.08.98 would be covered by the provisions of Section 11B *ibid*, as held by the Hon'ble High Court, Mumbai in the case of M/s.Standard Drum & Barrels Mfg. Co.,?

(ii) Whether the 1st respondent is entitled to canvass the correctness or otherwise of the order passed in order-in-original 19/2001 dated 9.5.2001 which only rejected the claim of refund by merely following the earlier finding made in provisional assessment order-in-original No.77/2000 dated 31.10.2000 especially when such order or the finding therein has not been challenged by the 1st respondent and the same have become final, conclusive and binding on the 1st respondent.?

3. Short facts leading to the filing of the appeal are as follows:

M/s.Apex Laboratories, Chennai, the 1st Respondent herein is a manufacturer of Pharmaceutical products falling under Chapter 3003.10 of Central Excise Tariff Act, 1985. The 1st respondent had filed refund claim of Rs.5,47,054/- on 01.03.2001, consequent to the finalization of provisional assessment, vide order, in original No.77/2000 dated 30.10.2000. Citing the aforementioned order in original, wherein it was held that since the duty element was passed on to their customers, the appellant/Assessee has no hold to claim the excess duty of Rs.5,47,054/- and upholding the findings in Order in Original cited *supra*, the Adjudicating Authority, rejected the claim under Section 11B of Central Excise Act, 1944 vide order in original No.19/2001 dated 09.05.2001.

4. The appellant/Assessee filed an appeal before Commissioner (Appeals), Chennai against the Order-in-Original No.19/2001 dated 09.05.2001. The Appellate Commissioner vide order in Appeal No.4/2002 (M-III) dated 04.02.2002 held as follows:

"The main objection of the appellant is that they did not collect any amount towards Excise duty specifically from the customers and their invoices do not reflect any excise duty amount as they are adopting cum duty price. I do not agree with the above arguments of the appellant as I have been

consistently holding the view that in the cases of adopting cum duty price, the burden of excise duty is indirectly passed to the customers. In fact, in respect of the same appellant company, I held the above view vide Order in Appeal No.129/2001(M-II) dated 12.12.2001. I find no reason to change my view and in the instant case I hold that the refund claim is hit by concept of unjust enrichment and I uphold the finding of the lower authority in this regard".

5. Aggrieved by the aforesaid order-in-appeal No.04/2002 (M-III) dated 04.02.2002, the 1st respondent/assessee preferred a further appeal before CESTAT, Madras, the 2nd respondent. Vide Final Order No.1033/08 dated 23.09.2008, the tribunal held that doctrine of unjust enrichment was not applicable to any claim for refund of duty consequential to the finalization of provisional assessment for any period prior to 25.06.1999 and allowed the appeal filed by the assessee.

6. As against the order of the Appellate Tribunal, vide Final Order No.1033/08 dated 23.09.2008, the department has preferred the instant Civil Miscellaneous Appeal on the substantial questions of law, stated supra.

7. Supporting of the substantial questions of law raised, Mr.A.P.Srinivas, learned counsel for the appellant submitted that the Appellate Tribunal has erred in holding that doctrine of unjust enrichment was not applicable to any claim for refund of duty consequential to finalization of provisional assessment for any period prior to 25.06.99.

8. Learned counsel for the appellant further submitted that the Appellate Tribunal ought to have noted that, the provisional assessment for the year 1998-99 was finalized vide Order-in-Original No.77/2000 dated 30.10.2000 and that the Adjudicating Authority vide Order-in-Original cited supra held, at the time of finalization of provisional assessment that it was proved beyond doubt that they have passed on the duty burden to their customers and that since the duty element was passed on to their customers, the 1st respondent/assessee has no right to claim the excess duty of Rs.5,47,054.03 and accordingly, transferred the said amount to the Consumer Welfare Fund in terms of Section 12C of Central Excise Act, 1944. Subsequently, the 1st respondent filed a refund claim of Rs.5,47,054/- on 01.03.2001 consequent upon the finalization of provisional assessment vide order in original No.77/2000 dated 30.10.2000. This refund claim was rejected vide order in Original No.19/2001 dated 09.05.2001 upholding the findings given in Order in original No.77/2000 dated 30.10.2000 cited supra. Therefore, learned counsel for the appellant submitted that from the facts above, it emerges that the 1st respondent/assessee had not challenged the order in

Original No.77/2000 dated 30.10.2000. However, it is important to point out that finalization of provisional assessment was done vide order in Original No.77/2000 dated 30.10.2000, which was subsequent to the amendment of Rule 9B of Central Excise Rules, 1944 in 25.06.1999.

9. In this regard, attention of this Court was drawn to the judgment of the Hon'ble High Court, Mumbai in the case of M/s.Standard Drum & Barrel Mfg. Co., reported in [2006 (199) ELT 590 (Bom.)], wherein the applicability of the doctrine of unjust enrichment to the refund claim arising out of finalization of provisional assessment for the period prior to 25.06.99 has been threadbare analysed.

10. Learned counsel for the appellant further submitted that in the said judgment, High Court, Mumbai, referred to the amended provisions of Section 11B of Central Excise Act, 1944 (Amended with effect from 01.08.1998) and at paragraph No.23 held as follows:

"By virtue of the aforesaid amendment to Section 11B with effect from August, 1, 1998, a person entitled to refund on finalization of the provisional assessment under the Excise rules, is required to follow the procedure prescribed under Section 11B of the Excise Act by making an application to the concerned authority before the expiry of six months ('one year' from May, 12, 2000) from the relevant date. Thus, by inserting clause (eb) to the Explanation in Section 11B of the Excise Act, the legislature has made it clear that from August 1, 1998, the refunds required to be made by the Revenue on finalization of the provisional assessments under the Excise Rules have to be claimed by the assessee by making an application within the time specified under Section 11B of the Excise Act. In other words, where refund accrues to the assessee on finalization of the provisional assessment after August, 1, 1998, such refund can be given to the assessee, only if the assessee claims that refund by making an application for refund within the time stipulated under Section 11B of the Excise Act and further establishes that the refund claimed therein has not been passed on to third parties."

11. Learned counsel for the appellant submitted that it was further held by High Court, Mumbai that the amendment effected to Rule 9B on June 25, 1999 is merely clarificatory in nature, as it merely reiterates the existing statutory provisions contained in Section 11B of the Excise Act from August, 1, 1998. Proceeding further, the High Court held that the assessee has filed the refund application on November, 1, 1999 and that since

amendment to Rule 9B(5) had come into force from June 25, 1999, the said refund application made on November 1, 1999 had to be disposed of as per the amended Rule 9B(5) by applying the principles of unjust enrichment contained in Section 11B of the Excise Act and that the contention, that the refund claimed in the application dated November, 1, 1999 pertains to the refund accrued to the assessee prior to June 25, 1999 and therefore the amended Rule 9B(5) has no application cannot be accepted for the simple reason that in view of the amendment to Section 11B with effect from August, 1, 1998, all refunds arising on finalization of the provisional assessments made under the Excise Rules are governed by the procedure prescribed under Section 11B of the Excise Act and the amendment to Rule 9B(5) on June 25, 1999 merely clarifies the legal position existing from August, 1, 1998. Accordingly, High Court, Mumbai proceeded to hold that the assessing officer was justified in holding that the refund arising on finalization of the provisional assessment on June 8, 1998 was governed by the principles of unjust enrichment contained in Section 11B of the Excise Act as amended by Act 21 of 1998. Thus, learned counsel for the appellant submitted that the Appellate Tribunal has erred in holding to the contrary.

12. Mr.A.P.Srinivas, learned counsel for the appellant, further submitted that the Appellate Tribunal, ought to have seen that the Provisional Assessment pertaining to the period 1998-99 was finalized on 30.10.2000 and accordingly, applying the ratio of the decision rendered by the High Court, Mumbai, quoted supra, the doctrine of unjust enrichment applies to the refund claim filed on 01.03.2001 filed, consequent to finalization of provisional assessment on 30.10.2000, as the finalization is made after 01.08.98/25.06.99. Hence, according to him, the Appellate Tribunal, was wrong in holding that the doctrine of unjust enrichment is not applicable to any claim or refund of duty consequential to finalization of provisional assessment for any period prior to 25.06.1999.

13. It is the submission of the learned counsel for the department that the appellate tribunal, while holding that the doctrine of unjust enrichment would not apply to refund arising out of finalization of Provisional Assessment for any period prior to 25.06.1999, referred to a few case laws and perusal of the case laws would show that they have either heavily relied on the decisions rendered in the case of Commissioner of Central Excise, Chennai Vs. TVS Suzuki Ltd., reported in 2003 (156) ELT 161 (SC) and Commissioner of Central Excise, Mumbai vs. M/s.Allied photographics India Ltd., [2004 (166) ELT 3 (SC)] or without citing any case law, but merely cited the amendment made to Rule 9 of Central Excise Rules, 1944 with effect from 26.05.1999, to hold that the principles of unjust enrichment would apply to refund in the given circumstances, only after 26.05.99. However, it is worthwhile to mention that the High

Court, Mumbai in the case of M/s.Standard Drum & Barrels Mfg. Co., [2006 (199) ELT 590 (Bom)] after discussing in detail the decisions rendered in the case of M/s.TVS Suzuki and M/s.Allied Photographics cited supra, distinguished those decisions and held that in the case of M/s.TVS Suzuki, refund on finalization of the provisional assessment had accrued to the assessee, therein, prior to the amendment of Section 11B on August 1, 1998. Similarly, with regard to M/s.Allied Photographics also, it was held that the issue before the Apex Court was relating to the refunds arising on finalization of the provisional assessment prior to August 1, 1998. Accordingly, it proceeded to hold that the refund in the case of M/s.Standard Drum & Barrels Mfg. Co., accrued after August 1, 1998 and accordingly distinguished the facts and circumstances involved in the case of M/s.TVS Suzuki and M/s.Allied Photographics. This vital aspect has been omitted to be considered by the Appellate Tribunal.

14. Learned counsel for the appellant submitted that it is clear from the above position that the case laws cited by the appellate tribunal, which relied on the decisions rendered in the case of M/s.TVS Suzuki and M/s.Allied Photographics, do not hold good, in view of the clear distinction brought out by High Court, Mumbai. With regard to the other case laws, which cited the amendment to Rule 9B(5) of Central Excise Rules, 1944, the decision rendered by the High Court, Mumbai, would have to be applied, as it has brought out, as to how the amendment brought out in Section 11B of Central Excise Act, 1944 would prevail over the amendment brought in Rule 9B ibid and the refund that arises consequent to finalization of provisional assessment after 01.08.1998 would be covered by the doctrine of unjust enrichment. Accordingly, applying the same ratio, as the refund arose, consequent to finalization of provisional assessment on 30.10.2000, the principles of unjust enrichment would apply.

15. Further, Mr.A.P.Srinivas, learned counsel for the appellant submitted that the same Bench of the Appellate Tribunal, relating to a case involving the 1st respondent/assessee covering the same issue passed an Order vide Final Order No.1045, 1046/08 dated 24.09.2008. In the said Final Order, the fact involved was refund arising out of finalization of provisional assessment for the period 1999-2000. The Appellate Tribunal following the decision rendered by the High Court, Mumbai in the case of M/s.Standard Drum and Barrels, cited in the paras supra, held that as the entire claim for refund relates to excess duty paid for the period after 01.08.1998, the doctrine of unjust enrichment is applicable to this case. This decision was rendered one day after the decision rendered in the subject Final Order which is dated 23.09.08. Hence, the Appellate Tribunal, ought to have followed the same ratio applied in their decision rendered on 24.09.2008

viz., the doctrine of unjust enrichment would apply as the refund relates to excess duty paid for the period after 01.08.1998, as the refund covered in the subject Final Order also arose consequent to finalization of provisional assessment on 30.10.2000, which also fell after 01.08.1998.

16. For the abovesaid reasons, Mr.A.P.Srinivas, learned counsel for the appellant prayed for setting aside the Final Order No.1033 of 2008 dated 23.09.2008.

17. Heard the Mr.A.P.Srinivas, learned Senior Standing counsel appearing for the appellant and perused the materials available on record.

18. Though the impugned order is assailed on the above grounds stated supra and Mr.A.P.Srinivas learned senior standing counsel made submissions in support of the substantial questions of law, placing reliance on the decision of the High Court, Mumbai in Commissioner of Central Excise Vs. M/s.Standard Drum & Barrel Mfg. Co., reported in [2006 (199) ELT 590 (Bom.)], we are not inclined to accept the same, for the reason that when a similar issue came up for consideration, a Hon'ble Division Bench of this Court in Commissioner of Central Excise, Chennai-I, Vs. Dollar Company Private Limited, reported in 2015 (327) ELT 13 (Mad.), after analysing Section 11 B of the Central Excise Act, which relates to claim for refund of duty, other provisions and following the decision of the Hon'ble Supreme Court in Commissioner of Central Excise, Chennai Vs. TVS Suzuki Limited, reported in 2003 (156) ELT 161 (SC), held as follows:

"7. Heard the learned standing counsel appearing for the appellant/Department and the learned counsel appearing for the respondent/assessee and perused the materials available on record.

8. Even at the outset, it can safely be said that the first substantial question of law is misconceived in the facts of the present case. Section 11B of the Central Excise Act relates to claim for refund of duty and explanation (B) to the said Section speaks about relevant date and clause (eb) deals with the date of adjustment of duty after the final assessment. For better clarity, reference can be made to Explanation (B) and clause (eb) to Section 11B of the Central Excise Act, which are extracted hereunder :-

"Section 11B. 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 Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in the form and manner 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 sub-section (2) substituted by that Act.

* * * * Explanation -

(A)

(B) relevant date means, --

(a)

(i)

(ii)

(iii)

(b)

(c)

(d)

(e)

(ea)

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

(f)"

9. In this case, there is no doubt that clause (eb) to Explanation B of Section 11B is squarely applicable and the assessee also does not dispute the same. But the only issue that is raised here is that whether the refund claim has been made in terms of the said provisions. It is evident from the records that the order of the Commissioner (Appeals) is dated 21.8.98 and the refund claim has been made by the assessee on 21.9.98. Therefore, for all purposes, the relevant date will be the date of adjustment of the duty after final assessment made thereof. In this case, consequent to the order of the Commissioner (Appeals), the refund claim was made. Therefore, it is clear that the date is well within the time stipulated under Section 11B and there can be no dispute raised by the Department on this aspect. Accordingly, the first substantial question of law becomes totally irrelevant and does not require to be answered.

10. The 2nd question of law raised is whether Notification No.45/99-C.E. (N.T.) dated 25.6.1999 would be applicable to the facts of the present case.

11. By virtue of the amendment, the provisions to sub-section (2) to Section 11B becomes applicable to the issues relating to provisional assessment of duty, whereby the provisions of unjust enrichment stood attracted.

12. In the present case, we are concerned with the period prior to amendment dated 25.6.99. On this issue, reliance was placed by the respondent on the decision of the Supreme Court in the case of Commissioner of Central Excise, Chennai Vs T.V.S. Suzuki Ltd. (2003 (156) ELT 161 (SC)). In the said case, the plea of refund claim, which was rejected by the Original Authority, was considered in the light of the amendment to Rule 9B (5) and in the said decision, the Supreme Court held that introduction of sub-rule (5) to Rule 9B is not retrospective in operation. In the said decision, the Supreme Court held as under :-

"In Mafatlal Industries Ltd (supra) a Bench of nine learned Judges of this Court held that refund claims consequent upon the adjustment under sub-rule (5) of Rule 9B would not be governed by the restrictions of Section 11A or Section 11B, as the case may be. This Court observed (vide paragraph 104) as under:

"Rule 9-B provides for provisional assessment in situations specified in clauses (a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that " when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9-B will not be governed by Section 11-A or Section 11-B, as the case may be."

In order to get over the situation arising under Mafatlal Industries Ltd. (Supra) vide notification No.45/99-CE (NT) dated 25.6.1999, an

amendment was made in sub-rule (5) of Rule 9B by adding a proviso thereto. The effect of the proviso is that, even after finalization of the provisional assessment under Rule 9B (5), if it is found that an assessee is entitled to refund, such refund shall not be made to him except in accordance with the procedure established under sub-section (2) of Section 11B of the Act.

There is no dispute that the refund claim in this case was made much prior to the addition of the proviso in sub-rule (5) of Rule 9B. On the date on which the refund claim was made, the law applicable was the law as declared by this Court in *Mafatlal Industries Ltd. (supra)* which we have reproduced above. However, it is contended by the learned counsel Shri Verma for the department, that the claim of refund would be governed by the proviso introduced in sub-rule (5) of Rule 9B, and that, as a consequence, the restrictions in Section 11A and Section 11B with regard to the procedure for refund would apply to the case of the respondent. The same question came up for consideration of this Court in *Sinkhai Synthetics & Chemicals Pvt. Ltd. v. C.C.E., Aurangabad*, (2002) 143 E.L.T. 17 SC. This Court took the view that the case would be governed by the rule laid down in *Mafatlal Industries Ltd. (supra)*. This view has been reiterated in a subsequent judgment of this Court in *C.A. No. 2533 of 2001. (Commissioner of Central Excise, Meerut v. M/s. Star Paper Mills Limited, [2003] 7 SCC 27)* upholding the view of the tribunal that the refund claim of the assessee before the court was justified.

Shri Verma fairly concedes that the proviso introduced in sub-rule (5) of Rule 9B cannot be said to be retrospective in operation. He, however, contends that on the date on which the proviso was brought into force, i.e. 25.6.1999, the refund claim was still pending with the departmental authorities and, therefore, it had to be adjudicated in accordance with the law as it became enforceable from 25.6.1999. In our view, this contention cannot be accepted. Merely because the departmental authorities took a long time to process the application for refund, the right of the assessee does not get defeated by the subsequent amendment made in sub-rule (5) of Rule 9B. The Commissioner of Central Excise and the CEGAT were, therefore, justified in holding that the claim for refund made by the respondent

had to be decided according to the law laid down by this Court in Mafatlal Industries Ltd. (supra) and would not be governed by the proviso to sub-rule (5) of Rule 9B.

In the result, we find no merit in appeal. The appeal is accordingly dismissed. However, there shall be no order as to costs Civil Appeal Nos. 2891/2001, 8380/2001 and 610-611/2002 In all these appeals the question which arises for our consideration is identical. The refund claims were made pursuant to the finalisation of provisional assessment orders and prior to 25.6.1999, i.e. the date on which the proviso to sub-rule (5) of Rule. 9B came into force. In our view, therefore, all these cases would be governed by the rule in Mafatlal Industries Limited (supra) namely that the restrictions in Section 11A and Section 11B would not apply to refund claims consequent upon finalisation of provisional assessment orders."

13. A reading of Section 9B (5) coupled with the judgment of the Supreme Court in TVS Suzuki case (supra), this Court is of the considered view that in the present case also, the refund claim was made on 21.9.98, long before sub-rule (5) to Rule 9B came into force. Therefore, the said decision of the Supreme Court is squarely applicable to the facts of the present case. Accordingly, the 2nd substantial question of law is answered in favour of the assessee and against the Revenue.

14. In the result, the appeal fails and the same is dismissed confirming the order passed by the Tribunal. In the circumstances of the case, there will be no order as to costs."

19. Decision of this Court in Commissioner of Central Excise, Chennai-I, Vs. Dollar Company Private Limited, reported in 2015 (327) ELT 13 (Mad.), is binding on us and squarely applies to the facts on hand. Following the said decision, substantial questions of law raised are answered in the negative, as against the revenue. The Civil Miscellaneous Appeal is dismissed. No Costs.

s/d-

Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

ars

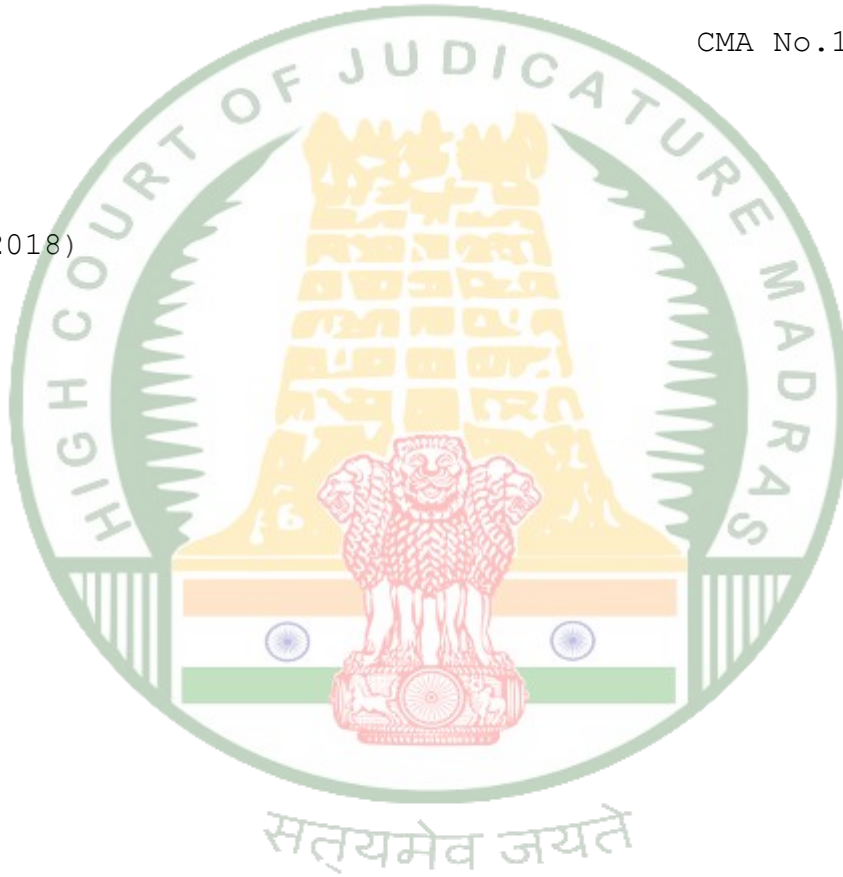
To

Customs, Excise and Service Tax Appellate
Tribunal, South Zonal Bench,
Shastri Bhawan, Annexe, 1st Floor,
26, Haddows Road,
Chennai - 600 006.

+1 CC to Mr.A.P. Srinivas, Advocate sr 20613.

CMA No.1034 of 2009

PA (CO)
SP(05/04/2018)



WEB COPY