BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Reserved on: 30.07.2019
Pronounced on: 21.01.2020
CORAM
THE HON'BLE DR.JUSTICE ANITA SUMANTH
W.P(MD).No.18012 of 2016
and W.M.P(MD)No.12990 of 2016

M/s.Dalmia Cement (Bharat) Ltd.,
Represented by its Senior General Manager Legal,
Mr.T.A.Srinivasen ...Petitioner

Vs.

1.The Commissioner of Central Excise,
Office of the Commissioner of Central Excise & Service Tax,
No.1, Williams Road, Cantonment,Trichy - 620 001.

2.The Assistant Commissioner of Central Excise,
Office of the Commissioner of Central Excise Division - II,
No.1, Williams Road, Cantonment,Trichy - 620 001.
... Respondents

Prayer : Writ Petition is filed under Article 226 of the Constitution of India for issuance of Writ of certiorarified mandamus calling for records in file bearing C No.IV/60/06/2003.C Ex.Adjn (PF2) comprising of Order - in- Original No.22/2016-17 dated 09.06.2016 on the file of the second respondent, quash the same and consequently direct the second respondent to pay the amount of interest/compensatory interest of Rs.22,22,59,298/- receivable as a consequent of the order of the Supreme Court in Civil Appeal. No.3600/2006 dated 02.09.2015 after deducting an amount of Rs.2,84,83,203/- already received by the petitioner.

For petitioner : Mr.N.Venkataraman for Mr.S.P.Maharajan
For Respondents : Mr.B.Vijay Karthikeyan

O R D E R

The petitioner is a manufacturer of cement. For the period between 01.06.1972 and 15.03.1976 one of the issues that arose in the excise duty assessments of the petitioner under the Central Excise Act 1994 (in short ‘Act’) was in regard to the payment of duty on 'Equalized Freight charges' while clearing excisable goods. Duty had been remitted under protest and a refund claimed thereafter. The details of quantum of duty remitted, the periods and dates of claim are tabulated below:

S.No	Claim Date	Period	Amount in Rs.
1.	20.06.1973	01.06.1972 to 31.05.1973	37,90,754.76
2.	06.04.1974	01.06.1973 to 31.12.1973	32,34,685.98
3.	06.08.1974	01.01.1974 to 30.06.1974	20,14,856.67
4.	02.06.1975	01.07.1974 to 31.12.1974	43,01,231.08
5.	07.11.1975	01.01.1975 to 30.06.1975	35,81,156.41
6.	28.01.1976	01.07.1975 to 30.09.1975	32,38,787.47
7.	28.01.1976	01.07.1975 to 30.09.1975	62,67,849.69
		TOTAL	2,63,69,322.06

2. The adjudicating authority rejected the claims for refund vide orders dated 16.10.1979 and 07.03.1980 and an appeal filed against the same was rejected by the Collector (Appeals), Madras, on 01.12.1980. A second appeal filed before the Customs, Excise and Gold (Control) Appellate Tribunal (in short 'CEGAT') upon transfer of a revision application from the Additional Secretary of the Government of India, was allowed on 06.06.1989 in the following terms:

5. We have carefully considered the submissions made by the learned Sr.Counsel and the learned Jt.C.D.R. It is seen that the impugned order of the Appellate Collector was passed in 1981 before the law regarding valuation was settled by the Supreme Court's decision in the Bombay Tyres International Case in which in para 50 of the Supreme Court's order the Hon'ble Supreme Court had clearly held 'not where freight is averaged and the freight is included in the wholesale case price so that the wholesale cash price to any place or places outside the factory gate is the same as the wholesale cash price to the factory gate, the averaged fright included in such wholesale cash price has to be deducted in order to arrive at the real wholesale cash price at the factory gate and no excise duty can be charged on it'. This position was *further confirmed by the Hon'ble Supreme Court in the case of union of India Vs. Coromandel Fertilizers cited supra by the learned Sr.Counsel where the court observed that "the only question arising in these appeals relates to the exclusion of equalized freight and this question is already concluded in favour of the assessee by our judgment in the case of Union of India Vs. Bombay Tyres International. The appeals are therefore, dismissed without any order as to costs. Of course, the actual amount of equalized freight which is eligible for exclusion will have to be determined by the excise authorities if there is any dispute in respect to it". We also find that subsequently the ratio of the Supreme Court's judgment had been followed in several decisions of the Tribunal in excluding equalized freight from the assessable value. Therefore, we find that the ratio of course decisions is clearly applicable in the present case where also is the question whether or not equalized freight includible in the assessable value. It is now well settled as seen above that the equalized freight is not to be included in the assessable value. It is now well settled as seen above that the equalized freight is not to be included in the assessable value. In the result there is a lot of force in the appellants submission and we, therefore, set aside the impugned order and allow the appeal. A plea has been made that the amount is pending for over 17 years. The departmental authorities will no doubt hear this in mind and expeditious to grant the consequential relief to the appellants herein.*

3. This order has attained finality. Since the order was not given effect to, the petitioner filed a Miscellaneous Application praying for its implementation that came to be ordered on 03.10.1991 with a direction to the Collector to implement the order on or before 10.10.1991 and report compliance failing which, the personal attendance of the Commissioner before the Bench was directed on 21.10.1991. There was no compliance by the Commissioner, but instead a request for extension of time that the Tribunal accepted, extending the time for compliance till 15.11.1991, compliance to be reported on 22.11.1991.

4. Around this time, Section 11B of the Central Excise Act 1844, (in short 'Act') was amended bringing into application the principle of unjust enrichment, with effect from 20.09.1991.

5. In the meantime, the petitioner moved the Delhi High Court with W.P.No.3225 of 1991, praying for a direction to the authorities to implement the order of the Tribunal dated 06.06.1989. The High Court, vide order dated 18.07.1995, directed the petitioners to appear before the authorities for examination of the issue of grant of refund in the light of the amendment to Section 11 B of the Act.

6. As against the aforesaid direction, a Review Petition was filed before the High Court that confirmed its earlier direction. After enquiry as ordered, the authority passed order-in-original dated 28.03.1996 to the effect that the amendment to Section 11B of the Act would apply to those cases where applications for refund were pending before the authorities as on the date of amendment i.e 20.09.1991. Thus, and in spite of the order of the CEGAT dated 06.06.1989, the provisions of Section 11B of the Act, post amendment, were invoked to reject the refund claims of the petitioner and a direction issued for crediting of the amounts to the Consumer Welfare Fund.

7. The aforesaid order was confirmed in appeal by the Commissioner (Appeals) vide order dated 20.12.1996. In second appeal, the CEGAT, vide order dated 27.01.1998 allowed the petitioners' appeal placing reliance on the judgment of the Supreme Court in *Mafatalal Industries Ltd. Etc. Vs Union Of India Etc.* (89 ELT 247) with consequential benefit.

8. With the amendment of the Act by Act 40 of 1991, the provisions of Section 11B read as follows:

> *(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:*

9. Significant questions concerning the refund of excise and customs duties had been raised in a batch of writ petitions and appeals and had come to be considered and decided by the Supreme Court in the case of *Mafatlal* (supra). One of the questions that arose was whether Section 11B would operate retro-prospectively and this issue was answered by the Bench that held that the amended provision would apply prospectively.

10. As against the order of the CEGAT, the respondents filed a reference application raising the question as to whether Section 11B of the Act, as amended, applies to those cases where, though an order has been passed directing refund, implementation of the order was yet pending. The Delhi High Court on 08.12.2005 confirmed the position that the provisions of Section 11B of the Act as amended would not apply to the petitioner and the specific question raised was answered in the negative i.e in favour of the petitioner and against the Department.

11. Applications for rectification of mistake and seeking stay were dismissed by the CEGAT by order dated 22.02.2000. As against the aforesaid order, a reference application was filed by the Revenue before the Delhi High Court and as against the rejection of the application seeking stay, a Writ Petition was filed by the revenue that came to be allowed by the High Court on 19.12.2000. The Court directed the Tribunal to consider the stay petition filed by the revenue and the same came to be dismissed by the Tribunal on 20.09.2002. The aforesaid order was also challenged by way of Writ Petition, that came to be dismissed on 02.04.2003. A Special Leave Petition challenging the aforesaid order was considered by the Supreme Court and by order dated 09.01.2004 the Bench held as follows:

> *We see no reason to interfere save and except that the respondent is directed to file an undertaking in this Court within two weeks from today, that in the event of the appellant's succeeding finally in the reference proceedings, they shall return the amount with interest at such rate as the Court may fix. The appeal stands disposed of accordingly. No order as to costs.*

12. Pursuant thereto, an amount of Rs.2,63,69,322/- was quantified as refundable in terms of Section 11B of the Act, on 23.02.2004 and sanctioned.

13. On 04.12.2006, the petitioner raised a demand for interest on the delayed payment of refund. The response of the authorities was that such demand could be considered only after its appeal against the order of the Delhi High Court dated 08.12.2005 was decided by the Supreme Court. On 02.09.2015, the Supreme Court dismissed the departmental appeal confirming the order of the Delhi High Court dated 08.12.2005 and settling once and for all, the position that amended Section 11B of the Act would not apply or be attracted to those cases, where the orders of refund had become final prior to the date of amendment.

14. The petitioner reiterated on 30.11.2015 its request for interest from date of refund claims to the date of grant of refund at 9% per annum. After several reminders and exchange of

correspondence, an order in original dated 09.06.2016, impugned before me, was passed granting interest only for the period 1995 to 2004 and rejecting the claim for the period 1973 to 1995.

15. The claims of the petitioner and the interest awarded/rejected are set out as follows:

Sl .No.	*Particulars*	*Amount Claimed (in Rs.)*	*Status of claims accepted/rejected by Department*
A	*Interest @ 15% for the period from date of refund applications to 25.05.1995*	*7,84,37,083/-*	*Not granted by Department*
B	*Interest for the period from 26.05.1995 to 23.02.2004*	*2,94,80,180/-*	*Refund of Rs.2,84 Crs. Granted by Department vide O-1-O dated 09.06.2016, except for three months*
C	*Compensatory Interest on Interest/ / compensatory interest of Rs.10.79 Crs. (A+B) @ 9% pa*	*11,43,42,035/-*	*Not granted by Department*
	Total Interest/Compensatoryinterest claimed by petitioner	*22,22,59,298*	

16. In line with the ratio of the decision in the case of *Swadeshi Polytex Ltd. Vs. Union of India* and Others [(2013) 22 GSTR 516], the petitioner claims interest in terms of Section 11B only from 26.08.1995, notwithstanding that the provision came into force from 26.05.1995.

17. According to the petitioner, it is entitled for interest under general principles from date of refund claims/applications, i.e. 1973 to 1995 and 26.08.1995 to 23.02.2004 and compensation for non-payment of interest as aforesaid for the period from dates of claim (1973-76) till date of payment.

18. Mr.Venkatraman, learned Senior Counsel appearing for Mr.S.P.Maharajan, learned counsel for the petitioner justifies the claim for interest stating that the assessee has been successful in regard to the issue of payment of duty on equalized freight charges by virtue of order passed on 06.06.1989; and there has been inordinate delay in issuing the refund legally due to it entitling it for interest and compensation for the loss of capital from the period 1973-76 till date.

19. He relies on the following case-law:

i) *Sandvik Asia Ltd Vs. Commissioner of Income Tax-I, Pune* (2006(196) E.L.T 257 (SC)

ii) *Gujarat Fluoro Chemicals V. Commissioner of Income Tax* (Special Civil Application No.12855 of 1994 dated 03.07.2007)

iii) *Commissioner of Income Tax, Gujarat V. Gujarat Fluoro Chemicals* (2013(296) ELT 433(SC))

iv) *Vamadev Exports Vs. Commissioner of Customs (Appeals)* (2018 (360) ELT 992).

20. The stand of the Department as projected in counter as well as argued by Mr.Vijay Karthikeyan, learned Standing Counsel, is two-fold. The impugned order is an appealable order and thus extraordinary jurisdiction under Article 226 of the Constitution of India is not liable to have been invoked. Secondly, there is no provision under the Act for grant of interest as sought and, the rejection of the claim is perfectively in order. Revenue relies on the following cases:

i)*The Commissioner of Customs(Exports) Chennai Vs. VBC Industries Limited* ((2011) 270 ELT 314)

ii) *J.K.Cement Works V. Asst. Commissioner of Central Excise and Customs* ((2004) 170 ELT 4)

iii) *Swadeshi Polytex Ltd. Vs. Union of India* and Others [(2013) 22 GSTR 516]

iv) *Modi Industries Limited V. Commissioner of Income Tax, Delhi* ((1995) 6 SCC 396)

v) *Union of India and Another Vs Shreeji Colour Industries* (SLP (c) No.2527 of 2007)

vi) *Union of India V. E.Merck (India)* (1998 (97 ELT 218)

21. Heard learned counsel in detail.

22. There is no dispute as regards the facts. On merits, that is, as regards the liability to duty itself, the petitioner has

admittedly remitted the duty in time, under protest, and succeeded in the claim as early as in 1989. Thereafter, it was at the instance of revenue that the matter travelled through the appellate hierarchy on the issue of whether the amendment to Section 11B of the stood attracted to the case of the petitioner or not. At all stages, the pronouncement of the Supreme Court in *Mafatlal* (dated 19.12.1996) was applied in favour of the petitioner and in September 2015, the Supreme Court categorically settled the issue in the petitioners' favour.

23. In *Modi Industries Limited, Modinagar and Others Vs. Commissioner of Income Tax, Delhi* [(1995) 6 SCC 396], a three judge Bench of the Supreme Court considered the question of entitlement to interest in the context of Section 214 of the Income Tax Act. At paragraph 58, the Bench makes it clear that an assessee may claim interest on delayed refund only if the fiscal enactment expressly provides for such a claim:

> *58. The argument, which was upheld in some of the cases now under appeal, is that it will be inequitable if the assessee does not get interest on the amount of advance tax paid, when the amount paid in advance is refunded pursuant to an appellate order. This is not a question of equity. There is no right to get interest on refund except as provided by the statute. The interest on excess amount of advance tax under Section 214 is not paid from the date of payment of the tax. Nor is it paid till the date of refund. It is paid only upto the date of the regular assessment. No interest is at all paid on excess amount of tax collected by deduction at source. Before introduction of Section 244(1A) the assessee was not entitled to get any interest from the date of payment of tax upto the date of the order as a result of which excess realisation of tax became refundable. Interest under Section 243 or Section 244 was payable only when the refund was not made within the stipulated period upto the date of refund. But, if the assessment order was reduced in appeal, no interest was payable from the date of payment of tax pursuant to the assessment order to the date of the appellant order.*

24. A Division Bench of the Supreme Court in *Union of India and Another Vs Shreeji Colour Industries* (supra), reiterated the above view in the context of a refund sought under the provisions of the Central Excise Act.

25. In the case of *VBC Industries ltd.* (supra), a Division Bench of this Court considered a claim for interest in a statutory appeal under the Customs Act and negatived the same making a

specific distinction between a claim of interest in a statutory appeal vis-à-vis a claim made under general provisions of law. Discussing the judgment of the Supreme Court in the case of *Sandvik Asia Ltd.* (supra), the Bench noted as follows:

> *20. It must be noted herein that the decision of the Apex Court is based on the interpretation of the word 'any amount' as appearing in Sections 240 and 244(1A) of the Income Tax Act and in the absence of any specific provision on grant of interest on the belated refund of the interest component, it applied the general principles. Quite apart, even otherwise, the facts therein indicated that the claim of the assessee was by way of Writ Petition, challenging the order of the Commissioner, rejecting the claim of the assessee for interest. Hence, the decision relied on by the learned Senior Counsel appearing for the assessee has to be understood in the context of the facts therein and the provisions of law and the same cannot be of any assistance to the assessee herein.*
>
> *21. As regards the applicability of general principles herein to the case, it must be pointed out that the proceedings before this Court is by way of appeal, as against the order of the CESTAT, made in exercise of Appellate Jurisdiction under the provisions of the Customs Act. In considering the question of law raised by the Revenue, one has to go in accordance with the provisions of the Customs Act and not by the general principles of law.*

26. The Bench accepted the argument of the revenue that interest would be payable only on a refund of duty and not interest. The difference in the language of the provisions of Section 11BB of the Act and Sections 240 and 244(1)(A) of the Income Tax Act, the latter employing the phrase *'any amount'* as distinguished with the phrase *'any duty'* in Section 11BB was noticed and applied.

27. In *J.K.Cement Works* (supra), the Rajasthan High Court held as follows:

> *39. Viewed from this point, in this matter it is apparent that notwithstanding the order under Sub-section (2) of Section 11 has been passed by CEGAT in appeal only on 15-12-2002, but as the application to claim refund has been filed much earlier before the date when it was required to be filed and the amount having not been made within three months from the date of application, the applicant became entitled to interest with effect from the such date on principal amount to be refunded to him ultimately pursuant*

to an order made under Section 11B at the rate notified by the Board from time to time, with effect from the date of expiry of three months from the date of application until date of payment of arrears of amount of excess Duty to Consumer Welfare Fund.

40. Since we have noticed above that prior to insertion of Section 11BB there was no statutory provision providing for interest on refund of amount of excess Duty if not paid within a specified date, there is no statutory provision providing for interest on non refund of amount of excess duty within a specified period or on specified date until insertion of Section 11BB. In the absence of any statutory provision for payment of interest no mandamus could be issued for payment of interest for the period prior to one provided in Section 11BB.

28. In *Sandvik Asia Ltd. Vs. CIT-1 Pune* [(2006) 196 ELT 257 (SC)], the Bench was concerned with a claim for interest on interest and states at paragraph 40 to 42 and 45 to 50 as follows:

40. *In the present appeal, the respondents have argued that the compensation claimed by the appellant is for delay by the revenue in paying of interest, and this does fall within the meaning of refund as set out in Section 237 of the Act. The relevant provision is Section 240 of the Act which clearly lays down that what is relevant is whether any amount has become due to an assessee, and further the phrase any amount will also encompass interest. This view has been accepted by various High Courts such as the Delhi, Madras, Kerala High Court etc. Whether on general principles the assessee ought to have been compensated for the inordinate delay in receiving monies properly due to it?*

41. The learned counsel for the appellant says that it cannot be denied that it has been deprived of the use of it's monies for periods ranging from 12 to 17 years. It also cannot be denied that such deprivation is solely due to the actions of the revenue which have been held by this Court to be contrary to the provisions of the Act, on general principles it ought to be compensated for such deprivation.

42. In the impugned order, the Bombay High Court has held that no compensation is required to be paid since "...there was a serious dispute between the parties, which was ultimately ordered to be paid pursuant to the order passed by this Court on 30.04.1997.

Undisputedly, the amount pursuant thereto was paid on 27.03.1998...". The Court further held that since the amount was paid once the controversy was resolved there was no wrongful retention of monies. No authority can ever accept an obligation to make payment and simply refuse to pay. In each and every case an authority must at least claim to act in accordance with law and hence claim it has no obligation to pay for some reason or another. When the claims of the authority are found to be unsustainable or erroneous by the Courts it follows that the authority has acted wrongfully in the sense of not in accordance with law and compensation to the party deprived must follow. If the decision of the High Court is upheld it would mean that there can never be any wrongful retention by an authority until this Court holds that their stand is not in accordance with law. Therefore, that on this issue as well, the impugned judgment cannot be sustained and ought to be reversed.

......

45. The facts and the law referred to in paragraph (supra) would clearly go to show that the appellant was undisputably entitled to interest under Sections 214 and 244 of the Act as held by the various High Courts and also of this Court. In the instant case, the appellant's money had been unjustifiably withheld by the Department for 17 years without any rhyme or reason. The interest was paid only at the instance and the intervention of this Court in Civil Appeal No. 1887 of 1992 dated 30.04.1997. Interest on delayed payment of refund was not paid to the appellant on 27.03.1981 and 30.04.1986 due to the erroneous view that had been taken by the officials of the respondents. Interest on refund was granted to the appellant after a substantial lapse of time and hence it should be entitled to compensation for this period of delay. The High Court has failed to appreciate that while charging interest from the assesses, the Department first adjusts the amount paid towards interest so that the principle amount of tax payable remain outstanding and they are entitled to charge interest till the entire outstanding is paid. But when it comes to granting of interest on refund of taxes, the refunds are first adjusted towards the taxes and then the balance towards interest. Hence as per the stand that the Department takes they are liable to pay interest only upto the date of refund of tax while they take the benefit of assesses *funds by delaying the payment of interest on refunds without incurring any further liability to pay interest. This stand taken by the respondents is discriminatory in nature and thereby causing great prejudice to the lakhs and lakhs of assesses. Very large number of assesses are adversely affected inasmuch as the Income Tax Department can now simply refuse to pay to the assesses amounts of interest lawfully and admittedly due to that as has happened in the instant case. It is a case of the appellant as set out above in the instant case for the assessment year 1978-79, it has been deprived of an amount of Rs.40 lakhs for no fault of its own and exclusively because of the admittedly unlawful actions of the Income Tax Department for periods ranging up to 17 years without any compensation whatsoever from the Department. Such actions and consequences, in our opinion, seriously affected the administration of justice and the rule of law.*

.....

50. *The assessment years in question in the four appeals are the assessment years 1977-78, 1978-79, 1981-82 and 1982-83. Already the matter was pending for more than two decades. We, therefore, direct the respondents herein to pay the interest on Rs.40,84,906 (rounded ofto Rs.40,84,900) simple interest @ 9% p.a. from 31.03.1986 to 27.03.1998 within one month from today failing which the Department shall pay the penal interest @ 15% p.a. for the above said period.*

29. The judgement in re.*Sandvik Asia Ltd.*, has been explained by three judges of the Supreme Court in *Gujarat Fluoro Chemicals* (supra), while considering a reference doubting its correctness. The question that arose for consideration was whether interest was payable by the revenue to an Assessee, if the aggregate installments of advance tax and TDS paid exceeds the assessed tax, in the context of the Income tax Act. In the opening paragraphs the Bench observes that the decision of the Division Bench directing refund to the assessee was in order to ensure proper and adequate compensation to the assessee for inordinate delay in granting refunds. At paragraphs 5 to 7 of the judgement, the Bench notes the introduction of Section 244A in the Income tax Act providing for statutory interest on refunds under various contingencies and clarifies that only such interest, provided for under statute, may be claimed by an assessee and none other. However, this does not tie the hands of the Court in considering whether, in a case where inordinate delay in effecting refund is established by an assessee, compensation may be ordered

for the loss of capital. A categoric distinction is made between a statutory claim of interest and a claim of compensation in law.

30. In my considered view, the issues in this writ petition stand settled by the judgement of the Supreme Court in *Gujarat Fluoro Chemicals* (supra).

31. The decisions cited by the revenue do not advance their case, as the claim for interest in the present case for the periods prior to insertion of Section 11BB, is considered solely as a measure of compensation, in the light of the admitted facts relating to the substantial, and, in my view, unjustified periods of delay.

32. Section 11B providing for the levy of interest was inserted with effect from 20.09.1991 and thus, an assessee may claim statutory interest only from the said date. The Revenue, in this matter, has granted interest for the aforesaid period and contends that there can be no additional claim over and above the interest already granted.

33. In *Gujarat Fluoro Chemicals*, the Bench was concerned with delays ranging from twelve(12) to seventeen (17) years in the grant of compensation on the delayed payment of interest. The grant of interest and compensation on delayed payment of interest was upheld. In the present matter, interest is claimed for various periodsin 1973 to 1976 till 25.05.1995 and compensation for loss of capital from date of payment of duty till date of payment of the same.

34. The defence of the Revenue throughout was that the provisions of 11B inserted with effect from 20.09.1991, would apply even to those cases where the order granting refund was yet to be implemented. This argument had been negated as early as in December 1996 by nine judges of the Supreme Court in the case of *Mafatlal* (supra). The applications for refund made between the years 1973 to 1978 were rejected by the Assistant Collector on 16.10.1979, 07.03.1980 and 01.08.1980 and allowed by the CEGAT on 01.06.1989 and 06.06.1989.

35. Section 11B was amended with effect from 20.09.1991. Post amendment, the Section provided for the test of unjust enrichment to be satisfied by the assessee. Thus, only where the Officer was of the view that the duty had not been collected from the person claiming refund or the instance of such duty had not been passed on by him could the refund be sanctioned. In *Mafatlal* (supra), the provision was held to be constitutionally valid, operating only prospectively. The relevant portion of the judgment is as follows:

> *38. As stated, Section 11B(2) and Section 11B(3) go together. The applications for refund made before the commencement of the Amendment Act, 1991, shall be deemed to have been made under Section 11B(1) of the Act as amended and it shall be*

dealt with in accordance with Section 11B(2) of the Act. The Section contemplates disposal of the applications pending on the date of the Amendment Act as also fresh applications filed after the Amendment Act, 1991, as per the amended provisions. Counsel for the assessees urged that the provisions relating to refund and, in particular, Section 11B(2) and (3) as amended in 1991 cannot apply to:

1. 'Refund' made or due as per orders passed by Court, in a suit or in a petition under Article 226 of the Constitution of India, which have become final.

2. refunds ordered by the statutory authority concerned which have become final.

It is obvious that in such cases no application can or will be deemed to be pending on the date of the commencement of the Amendment Act. No application praying for refund is to be filed in such cases, either. No further probe, regarding the requisites for obtaining refund specified in the Amendment Act, 1991, is called for in such cases. The above aspects are fairly clear. Section 11B(2) and (3) cannot be made applicable to refunds already ordered by the court or the refund ordered by the statutory authorities, which have become final. It follows from a plain reading of Section 11B, Clauses (1) (2) and (3) of the Act. The provisions contemplate the pendency of the application on the date of the coming into force of the Amendment Act or the filing of an application which is contemplated under law, to obtain a refund, after the Amendment Act comes into force. I am of the opinion, that if the said provisions are held applicable, even to matters concluded by the judgments or final orders of courts, it amounts to stating that the decision of the court shall not be binding and will result in reversing or nullifying the decision made in exercise of the judicial power. The legislature does not possess such power. The court's decision must always bind parties unless the condition on which it is passed are so fundamentally altered that the decision could not have been given in the altered circumstances. It is not so herein. Shri Prithvi Cotton Mills Ltd. and Anr. v. Broach Borough Municipality and Ors and Madan Mohan Pathak v. Union of India and Ors. Etc.. See also Comorin Match Industries (P) Ltd. v. State of Tamil Nadu,. Alternatively, it may be stated that duty paid in cases, which finally ended in orders or decrees or judgments of courts, must be deemed to have been paid under protest and the procedure and limitation etc. stated in Section 11B(2) read with Section 11B(3) will not apply to such cases. It need hardly be stated, that Section 11B(1), the proviso thereto, Section 11B(2) and Section 11B(3) read *together will apply only to (1) refund applications made before the Amendment of the Act and still pending on the date of commencement of Amendment Act, 1991 and (2) applications contemplated under law to obtain refund and filed after the commencement of the Amendment Act, 1991 (Cases dealt with in paras 5 and 29 of this judgment will not be covered by the above to the extent stated therein).*

36. Thus, the test of unjust enrichment was held to apply only to those applications for refund filed prior to the date of amendment that were yet pending. In the petitioners' case, the applications had been accepted by the CEGAT even prior to the date of amendment to Section 11B.

37. The legal issue as framed by the Delhi High Court in the Tax Case (Reference) was whether Section 11 B of the Central Excise Act, as amended applies to those cases where, though an order has been passed directing refund, implementation of the same was still pending. The reference was decided by the Bench on 08.12.2005 extracting elaborately from the judgment of the Supreme Court in *Mafatlal Industries* (supra). Paragraph 10 to 18 are relevant and are extracted hereunder:

10. On the facts of this case there are no merits in this Reference as the question involved is clearly settled by the 9 Judge Bench decision of the Supreme Court in Mafatlal Industries Ltd and Ors. v. Union of India and Ors. . What has been laid down therein is that if an application for refund has been disposed off, and the order had become final before the 1991 amendment to Section 11B came into force, the principle of unjust enrichment will not apply.

11. It may be mentioned that the main judgment in the case was delivered by Hon'ble Mr. Justice B.P. Jeevan Reddy, who held on behalf of himself and also on behalf of Hon'ble Mr.Justice J.S. Verma, Hon'ble Mr. Justice S.C. Agrawal, Hon'ble Mr. Justice A.S. Anand and Hon'ble Mr. Justice B.N. Kirpal. Since the judgment of Hon'ble Mr. Justice B.P. Jeevan Reddy amounts to a judgment of five Hon'ble Judges in a 9 Judge Bench, hence it is the majority judgment and anything inconsistent with that judgment in the judgment of other Hon'ble Judges has to be disregarded.

12. Thus in para 57 of his judgment Hon'ble Mr. Justice B.P. Jeevan Reddy observed:-

Page 0008 The first decision of this Court to consider the amended Section 11B is in Union of India v. Jain Spinners Ltd. The validity of the 1991 (Amendment) Act was, however, neither raised nor considered by the court. The impugned orders of the High Court, made before the coming into force of the 1991 (Amendment)

Act, directing refund of the excess duty collected to the manufacturers, this Court held, would defeat the provisions of amended Section 11B which had come into force during the pendency of the refund proceedings. The Court held that so long as the refund proceedings are pending, the amended provisions get attracted and disentitle the manufacturer-payer from claiming any refund contrary to the said provisions. In other words, the contention of the manufacturers that the amended Section 11B applies only to claims of refund, arising after the coming into force of the said Amendment Act was rejected.

13. The same opinion has been expressed by Hon'ble Mr. Justice B.P. Jeevan Reddy in para 108(xi) of the judgment wherein it is observed:-

> *" Section 11B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/ Tribunal/Authority or otherwise. It must be held that Union of India v. Jain Spinners and Union of India v. ITC have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated " in the sense that the appeal period has also expired" before the commencement of the 1991 (Amendment) Act (19-9-1991), they cannot be reopened and/or governed by Section 11B(3) [as amended by the 1991 (Amendment) Act]. This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.*

14. The view expressed by Hon'ble Mr. Justice B.P. Jeevan Reddy is also expressed by Hon'ble Mr. Justice K.S. Paripoornan in para 342 of the judgment wherein it is observed:-

> *"Sections 11B(2) and (3) cannot be made applicable to refunds already ordered by the court or the refund ordered by the statutory authorities which have become final. It follows from a plain reading of Section 11B, clauses (1), (2) and (3) of the Act. The provisions contemplate the pendency of the application on the date of the coming into force of the Amendment Act or the filing of an application which is contemplated under law to obtain a refund after the Amendment Act comes into force. I am of the opinion that if the said provisions are held applicable, even to matters*

concluded by the judgments or final orders of courts, it amounts to stating that the decision of the court shall not be binding and will result in reversing or nullifying the decision made in exercise of the judicial power. The legislature does not possess such power. The court's decision must always bind parties unless the condition on which it is passed are so fundamentally altered that the decision could not have been given in the altered circumstances".

15. The same view has also been expressed by Hon'ble Mr. Justice S.C. Sen in para 255 of the judgment which states:-

Page 0009 "I shall now examine the other provisions of the newly-added sections. Sub-section (1) of Section 11B requires an application for refund to be made. Sub-section (2) requires the Assistant Commissioner to pass an order of refund provided the conditions set out therein are fulfillled. Sub-section (3) merely lays down that no refund shall be made except as provided in Sub-section (2). There is a non obstante clause that this will operate notwithstanding anything to the contrary contained in any judgment, decree, order etc. It is obvious that new provisions will apply in cases where applications for refund were made before the new provisions came into force and also subsequently. Sub-section (3) has no retrospective effect. When a case has been finally heard and disposed of and no application for refund need be made, Sub-section (3) cannot apply. If there is a judgment, decree or order which has to be carried out, the legislature cannot take away the force and effect of that judgment, decree or order, except by amending the law retrospectively on the basis of which the judgment was pronounced.

16. Thus, 8 out of 9 Hon'ble Judges comprising the Bench have taken the same view that if the refund application has been finally disposed off by an order passed before the 1991 Amendment came into force, and that order had become final, then the amended Section 11B will not apply.

17. Only Hon'ble Mr. Justice A.M. Ahmadi took a contrary view vide paras 7 to 9 of his judgment, but it is not necessary to refer to that judgment since it cannot prevail over the view taken by 8 out of 9 Hon'ble Judges of the Bench in Mafatlal's case (supra).

18. It may be noted that Section 11B, after the 1991 amendment, stated that the party applying for refund has to establish that the incidence of such duty had not been passed on by him to any other person. It follows, therefore, *that Parliament did not apply the principle of unjust enrichment to cases covered by the unamended Section 11B, and it was for this reason that the amendment was made in Section 11B in 1991.*

38. The refund claimed was originally rejected and the rejection confirmed by the first appellate authority in 1980. In appeal to the CEGAT, on 06.06.1989, the issue on inclusion of averaged freight from wholesale cash price and the taxability of the same was decided in favour of the assessee, i.e., the petitioner herein. While allowing the appeal, the Department was specifically directed to take steps to grant consequential relief. The order is dated 06.06.1989, prior to amendment to Section 11B of the Act bringing into play the concept of unjust enrichment. With the appeal coming to be allowed, the refund became automatic, as a necessary incident of success in appeal. The subsequent litigation was on the question of whether there was unjust enrichment in the hands of the petitioner. I shall refer to this, for sake of convenience, as the second limb of litigation. It is this second limb of litigation that travelled in appeal all the way to Supreme Court, finally being decided in favour of the petitioner. In my considered view, the petitioner became entitled to the refunds on 06.06.1989 and there is no justification whatsoever for the delay occasioned thereafter.

39. In the light of the narration as set out above, I am of the considered view that the impugned order applying the provisions of Section 11BB to the facts and circumstances of this case, and granting statutory interest only for the period 26.08.1995 to 23.02.2004 does not take into account the facts and circumstances in proper perspective, either factually or legally.

40. Dehors the rigour of Section 11BB, an assessee is always entitled to seek recompense for inordinate delay in the grant of refunds. The nine Judge Bench in the case of *Mafatlal* (supra) has referred to availability of alternate remedies, in cases where the assessee is in a position to establish unjustified inordinate delay and procrastination on the part of the Department in issuing the refund. The entitlement of the petitioner to interest as has been decided as early as in 1989. The amendment to Section 11B has taken place thereafter and in any event, the Bench, in the case of *Mafatlal* (supra) rendered on 19.12.1996, has clarified the position unequivocally that the principle of unjust enrichment would apply only to those cases that were pending at the time when the amendment was occasioned. Pursuit of the second round of litigation from 1995 till the judgment of the Supreme Court on 02.09.2015 was one that was quite unwarranted and seen to be an exercise in futility. In fact, the Department has lost the battle on this score consistently from the stage of the Tribunal onwards, by its order dated 27.01.1998.

41. The entitlement of the petitioner, though termed 'interest', would really fall within the realm of 'compensation' as it cannot be denied that the petitioner has been deprived of a substantial amount of capital from 1989 onwards till date and till date of payment. I am thus of the view that the petitioner in this case is clearly entitled to compensation for the loss of capital from the date of success in its appeal before the CEGAT, being 06.06.1989 as well as compensation on the delay on payment of interest as claimed, and I order accordingly.

42. The petitioner is entitled to interest at the rate of 9% from 06.06.1989 till 25.08.1995 on the amount of refund and thereafter at the rates specified in Notifications of the Central Board of Excise and Customs in i) Notification No.41/2000-(N.T.), ii) Notification No.24/2001- Central Excise (N.T.) Dt.11/05/2001 (F.No.B-10/1/2001-TRU), iii) Notification No.17/2002- CE(N.T.) Dt.13/05/2002 (F.No.B-10/3/2002-TRU) and iv) Notification No.67/2003- CE (N.T.) Dt.12/09/2003 (F.No.04/07/2003 CX.I) and interest at the rate of 6% till date of payment, to be paid over to it within a period of six (6) weeks from date of receipt of a copy of this order.

43. This Writ Petition is allowed. No costs. Connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar ()

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

To

1.The Commissioner of Central Excise,Office of the Commissioner of Central Excise & Service Tax,No.1, Williams Road, Cantonment,Trichy - 620 001.

2.The Assistant Commissioner of Central Excise,Office of the Commissioner of Central Excise Division - II,No.1, Williams Road, Cantonment,Trichy - 620 001.

W.P(MD).No.18012 of 2016
and W.M.P(MD)No.12990 of 2016
21.01.2020

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