Ajni Interiors vs Union Of India on 4 September, 2019

Equivalent citations: AIRONLINE 2019 GUJ 341

Author: S.R.Brahmbhatt

Bench: S.R.Brahmbhatt, Umesh A. Trivedi

C/SCA/10435/2018 CAV ORDER

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 10435 of 2018

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AJNI INTERIORS Versus UNION OF INDIA & 1 other(s)

========== Appearance:

MR HASIT DAVE(1321) for the Petitioner(s) No. 1 MR NIRZAR S DESAI(2117) for the Respondent(s) No. 1, 2

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CORAM: HONOURABLE MR.JUSTICE S.R.BRAHMBHATT and HONOURABLE MR.JUSTICE UMESH A. TRIVEDI Date : 04/09/2019 CAV ORDER (PER : HONOURABLE MR.JUSTICE UMESH A. TRIVEDI)

1. This petition under Article 226 of the Constitution of India is filed with following main prayer:

"10(A) That Your Lordships be pleased to issue a writ of Certiorari or a writ in nature of Certiorari or any other appropriate writ order or direction quashing and setting aside the order dated 08.09.2017 passed by learned CESTAT at Ahmedabad, and further be pleased to by a writ of Mandamus direct the Respondent no.2 office to forthwith now grant the Refund of Pre-deposits of Rs.18,32,076.00, with appropriate interest as applicable from the date of our the 1st decision and or our application for the same".

C/SCA/10435/2018 CAV ORDER

2.1 The petitioner, M/s.Ajni Interiors, was

proprietorship concerned earlier changed to a privat

limited company under the Companies Act and it functioned in the name and style of M/s.Ajni Interiors than M/s.Ajni Clean Rooms Pvt. Ltd. (now known as, M/s.Ajni Industries Pvt. Ltd.). On a tip of-intelligence received by the Headquarter Officers of Preventive Section of the Excise Department that the petitioner is indulging in evasion of Central Excise Duty, a team of Central Excise Officers of Headquarter Preventive Vadodara-II visited the premises on 20.9.2005 to ascertain the facts on the basis of authorization as per the Search warrant issued on 20.9.2005 by the Competent Authority.

2.2 The petitioner, during the course of investigation, deposited Rs.15 Lacs through 6 different challans on different dates as a deposit and not any duty confirmed during the investigation. The said challans are at page No.75 to page No.81 to the petition. It has been deposited in Form No.TR-6 for depositing Central Excise Duty. Thereafter, a show cause notice dated 29.3.2006 was served upon the petitioner for the recovery of Central Excise Duty, with proposals, for demand of interest and imposition of penalties including penalties on the proprietor/partners.

C/SCA/10435/2018 CAV ORDER 2.3 It is further the case of the petitioner that prior to the adjudication of the show cause notice vide letter dated 20.6.2006, the Superintendent, Central Excise and Customs Range-III Division-City Vadodara-II, directed the petitioner to further pre-deposit Rs.3,32,076/- and accordingly, the petitioner had deposited the same in Form No.TR-6 Challan on 22.6.2006. In short, according to the petitioner, Rs.18,32,076/- has been deposited in Government Account through different challans. 2.4 It is further the case of the petitioner that said show cause notice was adjudicated by the Commissioner, Central Excise and Customs vide Order-in-Original No.09/ Commr./VDR/II/MP2006, dated 30.11.2006 against the petitioner.

2.5 The said order was carried in appeal before Customs Excise and Service Tax Appellate Tribunal (for short, 'CESTAT'), WZB, Ahmedabad, which came to be allowed by an order dated 31.07.2007.

2.6 It is further the case of the petitioner that the Department had challenged the order passed by the CESTAT dated 31.07.2007 before the Hon'ble Apex Court and that challenge failed. Not only that review application filed C/SCA/10435/2018 CAV ORDER by the department also came to be dismissed. 2.7 Therefore, the petitioner, after receipt of the order of the Hon'ble Supreme Court, addressed a letter dated 21.8.2010 to the Divisional Central Excise Authority for claiming refund of Rs.18,32,076/- on the ground that, it being pre-deposit / deposit made by the petitioner, during investigation. Pursuant to the said letter dated 21.8.2010, claiming refund, a notice dated 10.11.2010 was issued calling upon petitioner to show cause as to why the said application for refund should not be rejected as claim is made beyond the period of limitation as also it has not been made in prescribed form.

2.8 The petitioner, pursuant to the said show cause notice, submitted a detailed reply on 24.5.2011, claiming that, this is a case of return of pre-deposit and not any Central Excise Duty paid by the petitioner on any excisable goods and for such return of pre-deposit, the petitioner is not required to

file any formal refund claim, in prescribed form, under Section 11B of the Central Excise Act, relying upon the certain decisions and circulars of the Central Excise and Customs.

C/SCA/10435/2018 CAV ORDER

2.9 However, Respondent No.2 herein, rejected the entire

refund claim of Rs.18,32,076/- filed by the petitioner being time barred and not filed in prescribed form under Section 11B of the Act vide its Order-in-Original No.CD/82/Refund/11-12, dtd. 15-11-2011. 2.10 Being aggrieved by the rejection of refund claim, the petitioner preferred appeal No.SRP/542/VDR- II/2013 before the Commissioner (Appeals), who by order dated 13.3.2013, rejected the appeal and confirmed the impugned Order-in-Original.

2.11 The petitioner further carried the same before CESTAT by filing Appeal No.E/11707/2013-SM. The Appellate Tribunal by an order dated 8.9.2017 dismissed the appeal upholding the orders passed by the lower Authorities.

3. This petition, under Article 226 of the Constitution of India, is filed against orders refusing the refund claimed by the petitioner on the ground that it is not filed in a prescribed form and filed beyond the period of limitation.

4. Heard Mr.Hasit Dave, learned advocate for the petitioner. According to him, the amount deposited by the C/SCA/10435/2018 CAV ORDER petitioner vide 6 different challans amounting to Rs.15 Lacs are pre-deposit and not the payment made towards excise duty. He has further contended that since the said amount was deposited, during the course of investigation, even prior to issuance of show cause notice, it has to be mandatorily returned when the CESTAT found that no excise duty is payable by the unit on such activities carried on by the petitioner and retention of the same is in violation of Articles 14, 19(1)(g) of the Constitution of India. He has further contended that, any statutory appeal, in the present situation, is only illusory, at this stage, and has no any effective alternative remedy, since after contesting settled and covered issue for so many years, the petitioner has yet been denied justice and fairness.

5. It is further contended by learned advocate for the petitioner that amounts deposited during the course of investigation under coercion and threat of the Preventive Officers of the Central Excise Department, which visited it on 20.9.2005, and thereafter also, is always involuntary in nature and thus, under deemed protest also. It is further submitted that despite the petitioner having pointed out to the Authority that their activities are not manufacturing activities, liable to any excise C/SCA/10435/2018 CAV ORDER duty, as per the definition of the Excise Duty contained in Central Excise Rules, 2000 and Section 3 of the Central Excise Act, the petitioner was forced to pay the said amount under TR-6 challans. Therefore, deposits made by the petitioner cannot be considered as voluntary in nature. He has further argued that, as held by almost all High Courts in country and as also, Tribunal, as also Apex Court in a few decisions that any amount deposited during investigation,

whether with or without protest are always to be deemed under protest and accordingly, considered as deposits only and not as any duty. He has further submitted that law of the land as culled out in the judgments of the different High Courts, as also the Supreme Court that any amounts deposited during the course of investigation or prior to adjudication are always to be termed as deposit and not as any central excise duty. Therefore, he has submitted that Appellate Tribunal holding that the petitioner is not liable to pay any excise duty on the activities carried on by it,the amount deposited becomes automatically refundable on a simple letter and application under Section 11B of the Act is entirely out of question. It is further contended that there was never any question of lodging a protest.

As such, amount deposited during investigation automatically partakes the colour of pre-deposits

security deposits equated with made under Section 35F of the Act and therefore, the claim made by the petitioner is not governed under the provisions of Section 11B of the Act. It is further contended that the judgment of the Supreme Court in the case of Mafatlal Industries Ltd. and others V/s. Union of India and others reported in (1997) 5 SCC 536 has no applicability to the facts of the present case since the same only pertains to interpretation of Section 11B and grant of refunds of Central Excise Duty and the Customs duty and not for any deposits as made in the facts of the present case. In support of his contentions, he relied on following decisions, by producing copies of such decisions along with short written submissions.

(1) CC Raigadh V/s. Findacord Chemicals Pvt. Ltd. 2015 (319) ELT 616 (SC) (2) Union of India V/s. Suvidhe Ltd. 1997 (94) ELT A159 (SC) confirming the decision of Bombay High Court reported in 1996 (82) ELT 177 (Bom) (3) Union of India V/s. Nelco Ltd. reported in 2002 (144) ELT A-104 (SC) confirming the decision of Bombay High Court in 2002 (144) ELT 56 (Bom) (4) CCE V/s. Calcutta Iron & Steel Co. in 2018 C/SCA/10435/2018 CAV ORDER (360) ELT 257 (SC) confirming the decision of Calcutta High Court.

(5) CCE V/s. Flordia Electrical Inds Ltd. in 2005 (187) ELT A33 (SC)
(6) Shree Ram Food Inds V/s. UOI in 2003 (152) ELT 285 (Guj)
(7) CC V/s. Ericsson India Pvt. Ltd. in 2016 (332) ELT 697 (Del)
(8) CCE Chennai V/s. UCAL Fuel Systems Ltd. in

2014 (306) ELT 26 (Mad)
(9) CCE Lucknow V/s. Eveready Inds India Ltd in 2017 (357) 11 (All)
(10) Estee Auto Pressings P. Ltd. V/s. CC Chennai in 2017 (346) ELT 72 (Mad)

(11) CCE Cochin V/s. Transformers & Electricals Kerala in 2017 (346) ELT 59 (Ker) (12) Shreewood Products Pvt. Ltd. V/s. CCE in 2016 (340) ELT 79 (P&H) Technical Decisions on the above point (1) Gujarat Engg Works V/s. CCE Ahmd II in 2013 (292) ELT 547 (Tri Ahmd) following above few High Court decisions.

(2) Metro Motors V/s. CCE Daman in 2015 (39) STR 77 (Tri. Ahmd)
(3) Metal Plast Exim India Ltd. V/s. CC Kandla in 2012 (280) ELT 120 (Tri Ahmd)

On Grant of interest of such deposit.

(1) CCE Hyderabad V/s. ITC Ltd. (And many others) in 2005 (179) ELT 15 (SC) for mandatory interest on delay in return of deposits or pre-deposits.

CBECC circular on deposits during investigation not to follow S.11B (1) 984/08/2014-CX dated 16.9.2014.

6. As against that, Mr.Nirzar Desai, learned advocate for the respondents submitted that writ petition filed before this Court under Article 226 is not maintainable as equally efficacious statutory remedy available under Section 35G of the Act is not exhausted by the petitioner. Drawing attention to the affidavit in-reply filed on behalf of respondent Nos.1 and 2, it is submitted that the amount was deposited by the petitioner prior to issuance of show cause notice without any protest. It is further contended that the same had been paid towards basic excise duty under accounting code, that too, under TR-6 Challan. He has further contended that the Act provides for assessee to pay admitted duty liability even prior to issuance of show cause notice. Therefore, the petitioner has voluntarily paid such excise duty prior to even show cause notice under TR-6 challan. He has further submitted that there is a specific provision under Section 35-F of the Act for payment of pre-deposit.

As per the said provision, appellant is required to pay the pre-deposit amount prior to filing of appeal before the Appellate Authority. It is C/SCA/10435/2018 CAV ORDER further contended that the challans submitted by the petitioner clearly suggests that it is not a pre-deposit under Section 35F of the Act as the case was yet not adjudicated and there was no occasion to file appeal but it is payment made towards excise duty.

7. It is further contended by Mr.Desai, that the appellate Tribunal vide order dated 31.07.2007, set aside the order of adjudicating authority and therefore, the petitioner became entitled for the refund of the duty amount paid by it under the said challans within a period of one year from that date, it being relevant date. It is further contended that against the order of Tribunal dated 31.7.2007, there was no stay granted by any Court and therefore, for claiming refund, that would be a relevant date as defined under the Act. According to the respondents, the petitioner was supposed to submit the refund claim, that too, in a prescribed form by 30.7.2008. It is further contended that the petitioner had filed the letter dated 21.08.2010 seeking refund. Therefore, it was clearly time barred even if it is filed in a prescribed form. Therefore, it is contended that, not only, the said deposit was made without any protest but refund claim was filed beyond period of one year from the relevant date and therefore, rejection of refund C/SCA/10435/2018 CAV ORDER claim as time barred is proper.

8. In the affidavit in-reply submitted by the Department, a reliance is placed on the judgment of the Supreme Court in the case of Assistant Commissioner of Customs Vs Anam Electrical Manufacturing Co. reported in 1997 (90) ELT 260 (SC) and contended that refund application filed by the manufacturer beyond the statutory time limit under Section 11B, it must be held to be untenable in law, regardless any direction to the contrary contained in an order in appeal, suit or writ petition. In short, the submission is that the statutory time limit cannot be extended by any authority or Court in case of illegal levy.

9. Mr.Desai, learned advocate has further contended that the amount deposited by the petitioner through challans are paid towards the Central Excise duty liability. Therefore, it has to be refunded, as provided under the Act. In short, the submission on behalf of the Department is that for claiming refund of Excise Duty paid, one has to follow the procedure, as prescribed under Section 11B of the Act, that too, of the duty paid under the protest within the time prescribed therein from the relevant date. According to the Department, the C/SCA/10435/2018 CAV ORDER relevant date would be the date 7.8.2007 when the CESTAT (Appellate Tribunal) allowed the appeals filed by the petitioner. Therefore, the refund claim should have been filed by the petitioner by 30th July, 2008, that too, in prescribed form whereas, the petitioner has submitted application in letter form dtd.21.8.2010 claiming refund, beyond time, as provided under Section 11B of the Act.

10. Mr.Desai, learned advocate has further submitted that deposit of Excise Duty in Challan TR-6, by the petitioner even during course of investigation will never partake characteristic of pre-deposit as envisaged under Section 35F of the Act. What is provided under Section 35-F is deposit of certain percentage of amount with a view to prefer an appeal as condition precedent and therefore, the amount deposited by the petitioner cannot be stated to be pre-deposit, as contended.

11. Heard learned advocates for the parties.

12. For considering the argument of the learned advocate for the petitioner, it is profitable to refer to Section 11B of the Act which is as under:

> [11B. Claim for refund of [duty and interest, if any, paid on such duty] C/SCA/10435/2018 CAV ORDER (1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest if any, paid on 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 such 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 and interest, if any, paid on such duty in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty and interest, if any, paid on 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, (40 of 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) as substituted by that Act:
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> Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty] has been paid under protest.
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> [x x x x] (2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :
>
> Provided that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of C/SCA/10435/2018 CAV ORDER Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to-
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> (a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
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> (b) unspent advance deposits lying in balance in the applicant's current account maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;

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

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

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

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

C/SCA/10435/2018 CAV ORDER (3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

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

Explanation. -For the purposes of this section,-

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

(B) "relevant date" means,-

(a) in the case of goods exported out C/SCA/10435/2018 CAV ORDER of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods,-

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

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

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

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

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

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of its liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that C/SCA/10435/2018 CAV ORDER period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-

section (2) of section 5-A, the date of issue of such order;

(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;

(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction:

(f) in any other case, the date of payment of duty.

13. Considering this Section itself, it is clear that a person claiming refund of any excise duty and interest, has to make an application for refund of such duty and interest to the authority enumerated therein, that too, before the expiry of one year from the relevant date, in such form and manner as may be prescribed. Therefore, a claim for refund has to be filed in the prescribed form within one year from the relevant date. Again, relevant date is also defined in the Explanation (B) (ec) C/SCA/10435/2018 CAV ORDER considering the explanation with regard to relevant date, it is the date on which the Tribunal allowed the appeal preferred by the petitioner i.e. 7.8.2007. Thus, within one year from that date, the petitioner had to prefer claim for refund of Excise Duty in a prescribed form.

14. Considering the arguments advanced by learned advocates of the parties and scanning the material on record, it is clear that the case of the petitioner that payment towards Excise Duty is in the form of pre-deposit is misconceived. Considering the annexures annexed with the petition i.e. Challans for deposit of Central Excise Duty in Form No.TR-6, that too, without protest is the payment towards the Excise Duty and can never be considered as pre-deposit. If any payment is made as a pre-condition for exercising the statutory right it can be termed as pre-deposit. However,it cannot be equated with voluntary deposit of Excise Duty paid even during the course of investigation and prior to show cause notice or adjudication to assert that it is pre-deposit. The payment of duty was intended to prevent the incidence of interest and liability accruing from the non-payment of duty, and hence, it cannot be termed as deposit. Therefore, the payments made by the petitioner towards Excise Duty in Challans Form No.TR-6, can never partake C/SCA/10435/2018 CAV ORDER characteristic of pre-deposit as mentioned in Section 35F of the Act, as argued by learned advocate for the petitioner.

Under the circumstances, the contention that the amounts were paid involuntarily and, therefore, are deemed to be under protest and should be considered as deposits deserves to be rejected. Firstly as discussed hereinabove the payments made by the petitioner are in the nature of Central Excise Duty and hence, cannot be considered to be akin to or in the nature of pre-deposit as contemplated under Section 35-F of the Act; and secondly there is nothing on record to establish that the petitioner had paid the amount in question under protest, and hence the second proviso to sub-section (1) of Section 11B of the Act which provides that the limitation of one year shall not apply where duty and interest, if any, paid on such duty has been paid under protest would not be applicable. Once it is held that the payments made by the petitioner were in the nature of excise duty and were not deposits, the provisions of Section 11B of the Act would be attracted; and having regard to the fact that the amounts in question had not been deposited under protest, the petitioner would be liable to file the claim within the prescribed period of limitation and in the C/SCA/10435/2018 CAV ORDER manner prescribed by the statute, viz. in the prescribed format. It is an admitted position that the petitioner has not filed the refund claim within the prescribed period of limitation and hence, the Tribunal was wholly justified in rejecting the claim as being time barred.

15. Pursuant to refund claimed by the petitioner by letter dated 21.08.2010, show cause notice dated 10.11.2010 came to be issued by the Commissioner calling upon the petitioner to show cause as to

why total claim of Rs.15 Lacs should not be rejected under Section 11B of the Act as time barred, as also remaining amount of Rs.3,32,076/- should not be rejected since it is not filed in the prescribed form in terms of Section 11B of the Act. Pursuant thereto, hearing took place and the Assistant Commissioner, Central Excise and Customs, City Division, Vadodara passed an Order-in-Original No.CD/82/Refund/11-12 dated 15.11.2011 rejecting the entire refund claim as it being time barred under Section 11B of the Act. It would be profitable to refer a communication dated 21.08.2010 by which, apart from it being not in the prescribed form, nowhere it is stated that Rs.15 Lacs were deposited through Challan Form No.TR-6 under the threat or coercion from any of the Authority. Not only that, it has never been deposited C/SCA/10435/2018 CAV ORDER under protest. Not only in the refund claim application it is not so stated, even in defence reply filed before the Assistant Commissioner pursuant to the show cause notice, no such plea is raised. On the contrary, it is stated that it was a pre-deposit made by the assessee. At the same time, it is claimed in the defence reply that though the said amount is not paid under protest, it is required to be returned back by the Department.

16. The said order passed by the Assistant Commissioner refusing the refund was carried in appeal and Appellate Authority has also vide order dated 13.3.2013 passed Order- in-Appeal No.SRP/542/VDR-II/2013, rejected the appeal preferred by the petitioner and upheld the impugned Order in-Original passed by the Assistant Commissioner on the very same ground. Not deterred by the rejection of appeal by the Appellate Authority, it was carried in appeal before the Appellate Tribunal i.e. CESTAT, West Zonal Bench, Ahmedabad, which also came to be dismissed by an order dated 8.9.2017 in Appeal No.E/11707/2013-SM.

17. The Authority relied on the decision in the case of Mafatlal Industries Ltd. and others (supra) and considering the same rejected the claim. The Constitution C/SCA/10435/2018 CAV ORDER Bench of the Supreme Court, in a binding precedent, summarized the proposition of law in para-108, more particularly at proposition no.(i). It is relevant for our purpose, which reads as under;

> "108.....
>
> (i) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff- whether before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991 or thereafter- by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226- and of this Court under Article 32- cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction

> consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law" within the meaning of C/SCA/10435/2018 CAV ORDER Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and given effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasize in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal- which is not a department organ - but to this Court which is a civil court...."

(emphasis is ours)

18. Considering the Constitution Bench Judgment, it is clear that when the tax/duty collected by misinterpreting or misapplying the provisions of the Act or rules or regulations or notifications, issued under the said enactment, the claim for refund has to be necessarily preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. Though, the Constitution Bench of the C/SCA/10435/2018 CAV ORDER Supreme Court has held that jurisdiction of the High Court under Article 226 of the Constitution of India or of the Supreme Court under Article 32 cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. In view of Constitution Bench decision on the issue, any other view by any Court, Tribunal, etc. is unsustainable. Therefore, the decisions cited by the learned advocate for the petitioner requires no specific considerations thereof.

19. The Supreme Court in the case of Assistant Collector of Customs V/s. Anam Electrical Manufacturing Co. reported in (1997) 5 SCC 744 = 1997 (90) ELT 260 reiterated that question of refund shall be governed by the law declared in Mafatlal's case (supra) with clause (6) of the format order, enclosed therewith. Clause (6) of the Format stipulates that applicant / appellant claiming refund shall file affidavit stating that he has not passed on the burden of duty, which is claimed by way of refund, to another person. Thus, it is clear that claim for refund shall be governed as aforesaid supported by affidavit as prescribed in Clause (6) of the format C/SCA/10435/2018 CAV ORDER attached therewith in the judgment aforesaid.

20. Therefore, in our view, it is clear that on appeal being allowed quashing and setting aside the order of the Authority imposing duty, the petitioner has to apply for refund in accordance with the provisions under the Act. It is not the case of the petitioner that it has applied for refund in a prescribed form and within time. Over and above, it is not the case that it is paid under protest and on the contrary payment towards excise duty was voluntary and not under any protest. Even for payment made under protest also one has to apply in prescribed form under the enactment. Not only that it has to be supported by affidavit that it has not passed on the duty to another person.

21. Considering the principle laid down by the Supreme Court in Constitution Bench judgment, it is incumbent upon the person claiming refund of the duty / interest paid, has to claim it in accordance with provisions of the Act. Considering Section 11B of the Act, it is clear that for claiming refund under the Act, a person is to apply for the refund, in a prescribed form, of the duty / interest paid under protest, within a period of one year from the relevant date. Under Explanation below Section C/SCA/10435/2018 CAV ORDER 11B of the Act, relevant date is also defined and therefore, it was incumbent upon the petitioner to file refund claim in prescribed form within a period of one year from 7.8.2007 i.e. the order passed by the Tribunal in favour of the petitioner. In our view, the ratio propounded by the Constitution Bench of the Supreme Court, clearly obliges the petitioner to file refund claim in accordance with the Act. Therefore, not only this petition is not maintainable as equally efficacious remedy is not exhausted but it cannot be entertained under Article 226 of the Constitution of India as petitioner has not fulfilled the requirements to claim refund in accordance with the Act, as also the aforesaid judgments.

22. In our view, the scope for claim of refund is strictly governed by Section 11B of the Act and though in past, there were some judicial pronouncements widening the scope of claim of refund after Supreme Court elaborated reasonings in the case of Mafatlal (supra), there remains hardly any scope for judicial intervention to enlarge it further than what is permissible.

The claim of refund and time limit prescribed, therefore, has an avowed aim of attaching finality to the government receipt. Hence, before making any order or C/SCA/10435/2018 CAV ORDER direction, affecting it or seeking any writ resulting in refund, the claimant has to make out an extra ordinary case not covered by the decision of the Supreme Court in the case of Mafatlal (supra).

23. In view of the clear pronouncement of law by the Constitution Bench of the Supreme Court with regard to refund claim, precedents relied on by the petitioner are not applicable as they are not on the issue directly covering the field since the payment is made by the petitioner voluntarily during the course of investigation towards Central Excise Duty, in Form No.TR-6, without any protest and refund claim is also not filed in the prescribed form, that too, within a period of limitation as prescribed along with an affidavit stating that petitioner has not passed on duty to another person, this petition is liable to be rejected.

24. Hence, this petition is rejected.

(S.R.BRAHMBHATT, J) (UMESH A. TRIVEDI, J) ASHISH M. GADHIYA