HIGH COURT OF TRIPURA
_A_G_A_R_T_A_L_A_

WP(C) No.465 of 2020

Tripura Ispat (A Unit of Lohia Group). A partnership firm having its registered office at B.K. Road, Palace Compound, Agartala, Tripura (West), 799001 and its factory at Bodhjung Nagar, Industrial Growth Centre, Agartala, Tripura (West)-799008 and in the present proceedings represented by its partner, namely, Sri Rahul Lohia, son of Sri Kailash Chandra Lohia, resident of Maitri Kunj, NS Road, PO- Bharalumukh, Guwahati Kamrup, Assam, Pin-781009.

.....Petitioner(s)

Versus

1. Union of India, represented by the Secretary to the Government of India, Ministry of Finance, Department of Revenue, North Block, New Delhi.

2. Commissioner, Central Goods & Service Tax, Agartala, Jackson Gate Building, 3rd Floor, Lenin Sarani, Agartala-799001.

3. Assistant Commissioner, Central Goods & Service Tax, Agartala, Division-I, Jackson Gate Building, 3rd Floor, Lenin Sarani, Agartala-799001.

.....Respondent(s)

_B_E_F_O_R_E_
HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI
HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY

For Petitioner(s) : Dr. A.K. Saraf, Sr. Advocate,
Mr. Kousik Roy, Advocate.

For Respondent(s) : Mr. Paramartha Datta, Advocate.

Judgment & Order
delivered on : ***12th January, 2021***.

Whether fit for reporting : YES.

JUDGMENT & ORDER (ORAL)

(Akil Kureshi, CJ)

Petitioner has challenged a show-cause notice dated 03.07.2020 issued by the Assistant Commissioner of Central Goods & Service Tax, Agartala, respondent No.3 herein calling upon the petitioner to show-cause why an amount of Rs.53,06,055/- which according to the said respondents was erroneously refunded to the petitioner should not be recovered under Section 11A of the Central Excise Act, 1944 along with interest.

[2] Briefly stated the facts are as under :

Petitioner is a registered partnership firm and is engaged in the manufacture of excisable goods such as M.S. Ingots, HSD Bars, Rods etc. falling under Central Excise Tariff Sub Heading No.72142090 & 72061010. In order to encourage industrial growth in the North Eastern region and for the industrial development of the region the Government of India had formulated industrial policy. After due deliberations the Government of India issued a notification dated 24.12.1997 under which certain areas such as growth centres, infrastructure development centres, export promotion and industrial parks etc. were made tax free zones for a period of 10 years. Pursuant to such notification various circulars were issued giving shape to the said

industrial policy granting exemption from payment of excise and additional duty of excise. In subsequent policy decisions taken by the Government of India in the year 2007 also such concessions were continued. Attracted by the tax concessions offered by the Government of India the petitioner established a plant for manufacture of excisable goods such as M.S. Ingots, HSD Bars etc. in the State of Tripura. The commercial production commenced on or around 13th February, 2006. For the goods cleared by the petitioner from its manufacturing unit it claimed exemption under notification dated 25.04.2000 and claimed refund of CENVET duty paid in cash. In the year 2004 the Parliament introduced Education and Higher Education Cess. The petitioner was of the view that since there was exemption in payment of basic excise duty, Education and Higher Education cess also would be exempt. The petitioner therefore claimed refund of such duties paid in cash. However, the departmental authorities refused to refund the same at one stage.

[3] The question of collecting education cess and higher education cess on such goods which were exempt from payment of excise duty, came up for consideration before a two-Judge Bench of the Supreme Court in case of ***SRD Nutrients Private Limited versus***

Commissioner of Central Excise, Guwahati, reported in ***(2018) 1 SCC 105***. In the said decision it was held that the education cess and the higher education cess are in the nature of surcharge and when the primary tax i.e. the basic excise duty itself is exempt such additional levies cannot be collected. The Supreme Court concluded as under :

> ***"27. For the aforesaid reasons, we allow these appeals and hold that the appellants were entitled to refund of education cess and higher education cess which was paid along with excise duty once the excise duty itself was exempted from levy. There shall, however, be no order as to costs."***

[4] Based on the said decision of the Supreme Court the petitioner made refund applications before the competent authority. By an order dated 29th May, 2019 the Assistant Commissioner of Central Goods & Service tax, Agartala passed a detailed speaking order and held that the petitioner was entitled to receive the refund of the education cess and higher education cess collected on the goods cleared from its manufacturing units. Relevant portion of this order reads as under :

> ***"From the above discussion I am in the opinion that the Education Cess and the Secondary & Higher Education Cess bears the same characteristics of their parent levy i.e. the Excise duty and hence the refund of Education Cess and the Secondary & Higher Education Cess along with the Excise Duty will also bear the same characteristics as the Excise Duty. In the present scenario as the Refund of Excise Duty is not barred by unjust enrichment hence the refund of Education Cess and the Secondary & Higher***

> ***Education Cess along with the Excise Duty will also not barred by unjust enrichment and the refundable amount will also be calculated in line of the calculation of the Excise Duty refund.***
>
> ***I sanction an amount of Rs.35,97,315/- (Rupees thirty five lakh ninety seven thousand three hundred fifteen) as Education Cess and Rs.17,08,740/- (Rupees seventeen lakh eight thousand seven hundred forty) as Secondary & Higher Education Cess of totaling Rs.53,06,055/- (Rupees fifty three lakh six thousand fifty five) for the period from 2005-06 to 2014-15 as arrear refund to M/s Tripura Ispat, Bodhjungnagar Industrial Growth Centre, Bodhjungnagar, P.O. R.K. Nagar, Tripura (West), PIN 799008 as per judgment dated 10.11.2017 of the Hon'ble Supreme Court of India."***

[5] The petitioner received the refund as per the said order of the Assistant Commissioner. However, a few months after the Assistant Commissioner passed the said order, the decision of the Supreme Court in case of ***SRD Nutrients*** (*supra*) came up for consideration in three-Judge Bench judgment in case of ***Unicorn Industries versus Union of India and others*** reported in ***(2020) 3 SCC 492***. In ***Unicorn Industries***. The Supreme Court held and observed that the decision in case of ***SRD Industries*** (*supra*) was rendered per incuriam. Relevant portion of the judgment of the Supreme Court reads as under :

> ***"50. The decision of the larger Bench is binding on the smaller Bench has been held by this Court in several decisions such as Mahanagar Railway Vendors' Union v. Union of India, State of Maharashtra v Mana Adim Jamat Mandal and State of U.P. v. Ajay Kumar Sharma. The decision rendered in ignorance of a***

> ***binding precedent and/or ignorance of a provision has been held to be per incuriam in Subhash Chandra v. Delhi Subordinate Services Selection Board, Dashrath Rupsingh Rathod v. State of Maharashtra and Central Board of Dawoodi Bohra Community v. State of Maharashtra. It was held that a smaller Bench could not disagree with the view taken by a larger Bench.***
>
> ***51. Thus, it is clear that before the Division Bench deciding SRD Nutrients (P) Ltd. and Bajaj Auto Ltd., the previous binding decisions of the three-Judge Bench in Modi Rubber Ltd. and Rita Textiles (P) Ltd. were not placed for consideration. Thus, the decision in SRD Nutrients (P) Ltd. and Bajaj Auto Ltd. are clearly per incuriam. The decisions in Modi Rubber Ltd. and Rita Textiles (P) Ltd, are binding on us being of coordinate Bench, and we respectfully follow them. We did not find any ground to take a different view.***
>
> ***52. Resultantly, we have no hesitation in dismissing the appeals. The judgment and order of the High Court are upheld, and the appeals are dismissed. No costs.***

[6] Based on the decision of the Supreme Court in case of ***Unicorn Industries*** (*supra*) the Assistant Commissioner issued impugned show cause notice. According to him, the refund of education cess and higher education cess was erroneously granted and therefore in terms of Section 11A of the Central Excise Act the same was liable to be recovered. He, therefore, called upon the petitioner to show cause why such amount should not be recovered with interest.

[7] This show cause notice the petitioner has challenged in the petition raising several legal contentions. As is well settled, ordinarily

High Court would not encourage litigation at the very threshold when a competent authority has merely issued a show cause notice and not yet taken a final decision. The noticeee would ordinarily be asked to respond to the show cause notice and allow the competent authority to pass order in accordance with law. However, in the present case the petitioner has questioned the very jurisdiction of the Assistant Commissioner to raise a demand for recovery of the refund already released. No factual aspects are involved. We have, therefore, heard learned counsel for the parties at considerable length for final disposal of the petition.

[8] Appearing for the petitioners learned counsel Dr. Saraf painstakingly took us to the relevant statutory provisions and case law and contended that the Assistant Commissioner had passed the order of refund based on the decision of the Supreme Court in case of ***SRD Nutrients*** (*supra*) which held the field at the relevant time. Any subsequent change in law, would not authorize the competent authority to seek recovery of such refund since his original order can neither be stated to be erroneous nor would any such change in law will cloth him with the jurisdiction to seek recovery in terms of Section 11A of the Central Excise Act. Counsel has placed for our consideration several

decisions of Supreme Court and various High Courts, some of which are for the purpose of pressing home the same contention. We would, therefore, refer to select few decisions at the appropriate stage.

[9] On the other hand, learned counsel for the revenue opposed the petition. He submitted that the decision of the Supreme Court in case of ***SRD Nutrients*** (*supra*) was disapproved in the subsequent decision in case of ***Unicorn Industries*** (*supra*) in which the three-Judge Bench held and observed that the decision in case of *SRD Nutrients* was per incuriam. The impugned notice has been issued within the period of limitation prescribing Section 11A of the Act. The Assistant Commissioner was thus justified in invoking the correct law as declared by the Supreme Court in subsequent decision. Petition may, therefore, be dismissed.

[10] None of the relevant facts are in dispute. The petitioner having set up a manufacturing unit in the State of Tripura, availed the benefit of duty exemption on the goods cleared from such manufacturing unit pursuant to the Government of India policy to encourage industrial investment and growth in North Eastern region. The petitioner contended that since the basic duty of excise was not payable the additional charge of education cess and higher education

cess also cannot be collected. Based on the decision of the Supreme Court in case of *SRD Nutrients*, the petitioners made refund claims for refund of education and higher education cess. Such refund application was allowed by the Assistant Commissioner. However, soon thereafter in the decision in case of *Unicorn Industries* the Supreme Court held and observed that decision in case of *SRD Nutrients* was rendered per incuriam. Short question is in view of such factual scenario can the Assistant Commissioner seek recovery of refund already granted.

[11] In this context, we may first refer to Section 11A of the Central Excise Act. It pertains to recovery of duties not levied or not paid or short levied or short paid or erroneously refunded. Relevant portion of this Section reads as under :

> ***"(1) When any duty of excise has not been levied or paid or has been short- levied or short- paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice".***

Provided that where any duty of excise has not been levied or paid or has been short- levied or short- paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub- section shall have effect as if for the words one year, the words" five years" were substituted.

4. Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of
(a) fraud; or
(b) collusion; or
(C) any wilful mis-statement; or
(d) suppression of facts; or
(d) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty."

[12] Section 11A thus makes a distinction between the cases of duty of excise not having been levied, paid or short levied or short paid or erroneously refunded for the reason of fraud, collusion or any mis-statement or suppression of facts or contravention of the provisions of the Act or the rules with intent to evade payment of duty and in cases where none of these elements is present. Under sub-section 1 of Section 11A when any such duty of excise has not been levied, paid or short levied or short paid or erroneously refunded for reasons other than fraud, collusion etc. the Central Excise Officer would within 2 years from the

relevant date serve a notice on the person chargeable to the duty calling upon him to show cause why the amount specified in the notice along with interest not be recovered. Sub-section 1 of Section 11A thus authorizes the Central Excise Officer to recover any duty of excise, besides others, which has been erroneously refunded. It is in this context that the term erroneously refunded assumes significance. Before we refer to certain decisions on the question of erroneously refunded or erroneously ordered, we may briefly state that when the Excise Officer passed the order of refund, he was applying the law laid down by the Supreme Court which by virtue of Article 142 of the Constitution is the law of the land. He had no other choice but to follow the decision of the Supreme Court in case of ***SRD Nutrients*** (*supra*). Any other action on his part would be wholly illegal. His order of refund thus was in consonance with the law declared by the Supreme Court at the time when he was passing the order. In our view any subsequent change in the legal position, would not permit him to invoke the powers under Section 11A of the Central Excise Act. As is well settled, all legal proceedings on the date when they are being decided by any Court, would be governed by the law laid down by the Supreme Court which prevails on such date. As is often happens, a decision of the Supreme Court is reviewed, reconsidered or overruled by larger Bench. Such

subsequent decision would undoubtedly clarify the position in law and such declaration would undisputedly apply to all pending proceedings, the proceedings which are closed in the *meantime*, cannot be reopened on the basis of subsequent declaration of law by the Supreme Court. Any other view would lead to total anarchy. Based on the judgment of the Supreme Court several proceedings would have been decided. If years later such view is reversed, the parties who had not carried the proceedings in higher forum and thus not kept the proceedings alive, cannot trigger a fresh look at the decision already rendered by the competent court on the basis of the previous judgment of the Supreme Court which was correctly applied at the relevant time.

[13] If the department was aggrieved by the refund order passed by the Assistant Commissioner, it was open for the department to file appeal against such order as is provided in Section 35 of the Central Excise Act, 1944. It is well settled that under section 35 even the department can be stated to the person aggrieved against an order that the competent authority may pass. Thus the order of assessing officer is open to challenge at the hands of the department under Central Excise Act unlike in case of Income Tax Act, 1961 where the assessing officer's order of assessment cannot be appealed against by the

department and a limited review is available under Section 263 of the Income Tax Act, 1961.

[14] We have briefly touched on this difference in statutory scheme of the Central Excise Act against the Income Tax Act in order to drive home the point that if the department was desirous of pursuing the question of leviability of education and higher education cess when the basic duty of excise was exempt, it ought to have carried the order of refund passed by the Assistant Commissioner in appeal. Only if such appeal was pending or could have been filed within the period of limitation subject to power of condonation of delay, can the department take advantage of the change of law declared by the Supreme Court.

[15] Section 11A of the Central Excise Act does not authorize the Assistant Commissioner to revise or review his own order. In the show cause notice effectively what he proposes to do is revise and recall his own order on the ground that the law that he applied when he passed order of refund, has since been changed. This in our opinion is wholly impermissible.

[16] In this context, we may refer to the decisions of the Supreme Court in case of ***Priya Blue Industries Ltd. versus***

Commissioner of Customs (Preventive) reported in ***(2005) 10 SCC 433*** and ***Collector of Central Excise, Kanpur versus Flock (India) Pvt. Ltd., C-7, Panki Industrial Area, Kanpur*** reported in ***(2000) 6 SCC 650***. In case of ***Flock (India) Pvt. Ltd.*** (*supra*) it was held that by the order of classification of the goods passed by the adjudicating authority though appealable was not challenged by filing appeal and the assessee paid the duty, he could not subsequently challenge the correctness of the order by filing a refund claim on the ground that the said order was erroneous. In case of ***Priya Blue Industries Ltd*** (*supra*) it was observed that an assessment order unless reviewed or modified in appeal stands and in absence of such modification of the order of assessment a claim for refund would not be maintainable.

[17] These are the decisions where under a reverse situation an assessee would seek refund of a duty paid without questioning, challenging or having the order of assessment reversed or modified in appeal. In our opinion the same analogy would apply in the present case also; though to the detriment of the department. We may also refer to the decision of the Supreme Court in case of ***Mafatlal Industries Ltd. and others versus Union of India and others*** reported in ***(1997) 5 SCC 536*** where the nine-Judge Bench of the Supreme Court settled several issues

of refund of excise and customs duties. One of the principles settled by the majority judgment was that each party must carry his own assessment in appeal and cannot rely on the order of the higher forum in case of some other assessee to claim refund of the duty collected in his case.

[18] In case of ***State of Haryana versus Free Wheels (India) Ltd.*** reported in ***1997 SCC Online P&H 1849 : (1997) 107 STC 332***, the Division Bench of Punjab and Haryana High Court had observed as under :

> ***"(5) From the perusal of section 40 as reproduced above, it would be apparent that the Commissioner can call for the record of any case pending before or disposed of by any Assessing Authority or appellate authority to satisfy himself as to the legality or propriety of any proceedings or any order and pass such order in relation thereto as he may think fit. The scope of revisional powers is, thus, only to examine legality or propriety of any proceedings or any order. That being the scope of the revision, the only question that, thus, needs determination is as to whether the appellate authority while accepting the appeals preferred by M/s. Free Wheels (India) Limited as on the day when the appeals were decided had committed any illegality or the orders suffered from any impropriety. All that is stated on behalf of the counsel representing the State of Haryana is that the appellate authority had based its decision on the decision of the Tribunal in M/s. Liberty Footwear Co., Karnal, which decision could not be held to be laying down the correct law in view of the later decision rendered by the Tribunal in M/s. Steel Kraft, Panipat. We do not find any merit in the contention of the learned counsel as on the day when the***

appellate authority decided the appeals preferred by Free Wheels (India) Ltd. , the decision rendered by the Tribunal in M/s. Liberty Footwear Co. , held the field. If on a subsequent decision the Tribunal has taken a contrary view it would not make the proceedings that have been finalised far earlier and are based upon an earlier decision of the Tribunal either illegal or improper. If the contention of the learned State counsel is upheld, it would result into endless litigation as all matters finalised earlier on the basis of law then in existence and holding the field would need reconsideration if law changes in succeeding years. All matters that have been finalised shall be then reopened, thus, unsettling the settled matters, in any case, as mentioned above, the order passed by the appellate authority which was based upon the law then holding the field could not possibly be styled as illegal or improper. That apart, the Commissioner by powers vested in him by virtue of section 40 on his own motion can call for the record of any case pending or disposed of by any Assessing Authority or appellate authority other than the Tribunal. The decision of the appellate authority that was set aside by the revisional authority as mentioned above was based upon the decision of the Tribunal, even though, therefore, the revisional authority was not reopening the case decided by the Tribunal, it virtually amounts to upsetting an order that is based upon the decision of the Tribunal."

[19] Learned counsel for the petitioner has also drawn our attention to the decision of the Supreme Court in case of ***Malabar Industrial Co. Ltd. versus Commissioner of Income Tax, Kerala State*** reported in ***(2000) 2 SCC 718*** in which in the context of the term used erroneous in Section 263 of the Income Tax Act, 1961 it was observed as under :

> ***"There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind."***

[20] For the reasons stated above, the petition succeeds. The impugned show cause notice dated 03.07.2020 issued by the Assistant Commissioner of Central Goods & Service Tax, Agartala is set aside.

[21] Petition is disposed of accordingly. Pending application(s), if any, also stands disposed of.

(S.G. CHATTOPADHYAY, J) **(AKIL KURESHI, CJ)**

Dipesh