THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

Dated: 05th September, 2024

DB: HON'BLE MR. JUSTICE BISWANATH SOMADDER, CHIEF JUSTICE
HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

TAX APP. NO. 01 OF 2024

Commissioner of Central Goods and
Services Tax and Central Excise,
Siliguri Commissionerate,
C.R. Building, Hakimpara,
Haren Mukherjee Road,
Siliguri, West Bengal-734001 …Appellant

-versus-

M/s Alkem Laboratories Ltd.,
Represented through the Plant Head/Unit Head,
Kumrek, Rangpo,
District – East Sikkim, 737132. …Respondent

Appearance:

Ms. Sangita Pradhan, Deputy Solicitor General of India assisted by Ms. Natasha Pradhan, Advocate for the appellant.

Mr. Mahesh Raichandani and Mr. Ranjit Prasad, Advocates for the respondent.

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JUDGMENT : (per the Hon'ble, the Chief Justice)

This is a statutory appeal arising from a final order dated 14th September, 2023, passed by the learned Customs, Excise and Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata, (Regional Bench - Court No. 1) in Excise Appeal No. 75147 of 2023 (*M/s Alkem Health Science vs. Commissioner of Central Goods and Services Tax and Central Excise, Siliguri Commissionerate*) along with Excise Appeal No. 75148 of 2023 (*M/s Alkem Laboratories Limited vs. Commissioner of Central Goods and Services Tax and Central Excise, Siliguri Commissionerate*).

This appeal has been preferred by the Commissioner of Central Goods and Services Tax and Central Excise, Siliguri Commissionerate, under section 35G of the Central Excise Act, 1944 (hereinafter referred to "the Act of 1944").

By the impugned final order, the learned Tribunal was pleased to allow the two appeals referred above in the following manner:—

> "8. We find that refund claims were sanctioned in the light of the decision of the Hon'ble Apex Court in the case of SRD Nutrients (supra) and thereafter the decision of the SRD Nutrients (supra) was over-ruled by the Hon'ble Apex Court in the case of Unicorn Industries (supra), it does not mean that at the time of sanctioning of refund claim, the decision of the Hon'ble Apex Court in the case of SRD Nutrients was valid. As the decision of Hon'ble Apex Court in the case of SRD Nutrients (supra) during the relevant period holding the field, in that circumstances, the refund claims were rightly sanctioned to the appellants as held by the Hon'ble High Courts in the above-cited decisions namely Tripura Ispat vs. UOI (supra), therefore, we hold that the show cause notice issued to the appellant are not sustainable.
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> 9. Accordingly, the impugned orders are bad in law. Accordingly, the same are set aside.
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> In the result, the appeals are allowed with consequential relief, if any."

The learned Deputy Solicitor General of India representing the appellant submits that the decision of the Hon'ble Supreme Court referred to and relied upon by the authority which sanctioned the refund claims of the respondent, being the case of *M/s SRD Nutrients Private Limited. vs. Commissioner of Central Excise, Guwahati*, [*(2018) 1 SCC 105*] was subsequently overruled by the Hon'ble Supreme Court of India in the case of *M/s Unicorn Industries vs. Union of India and others* reported in [*(2020) 3 SCC 492*]. As such, she submits that the powers of the concerned authority to invoke the provisions of section 11A of the Act of 1944, for recovery of duty erroneously refunded, would have been very much permissible in the facts of the instant case.

When asked by this Court as to when the M/s Unicorn Industries judgment came into force, the learned Deputy Solicitor General of India submitted that it came into force at a subsequent date, that is, after the refund claims were sanctioned by the competent authority.

The short question which, therefore, arises for consideration in the facts of the instant case is whether the subsequent judgment of the Hon'ble Supreme Court rendered in *M/s Unicorn Industries* (supra) overruling the judgment of *M/s SRD Nutrients* (supra) will be applicable in the facts of the instant case.

Before we proceed to answer this question, we need to take notice of section 11A of the Act of 1944, which reads as follows:—

> "**11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.—** (1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful mis-statement 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,—
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> (a) the Central Excise Officer shall, within two years from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so 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;
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> (b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of,—
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> (i) his own ascertainment of such duty; or
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> (ii) the duty ascertained by the Central Excise Officer,
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> the amount of duty along with interest payable thereon under Section 11AA.
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> (2) The person who has paid the duty under clause (b) of sub-section (1), shall inform the Central Excise Officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty so paid or any penalty leviable under the provisions of this Act or the rules made thereunder.
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> (3) Where the Central Excise Officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of two years shall be computed from the date of receipt of information under sub-section (2).
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> (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—
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> (a) fraud; or
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> (b) collusion; or
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> (c) any wilful mis-statement; or
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> (d) suppression of facts; or

(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,

by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under Section 11AA and a penalty equivalent to the duty specified in the notice.

(5) Omitted by Act 20 of 2015, sec. 93(i) (w.e.f. 14-5-2015).

(6) Omitted by Act 20 of 2015, sec. 93(i) (w.e.f. 14-5-2015).

(7) Omitted by Act 20 of 2015, sec. 93(i) (w.e.f. 14-5-2015).

(7A) Notwithstanding anything contained in sub-section (1) or sub-section (3) or sub-section (4), the Central Excise Officer may, serve, subsequent to any notice or notices served under any of those sub-sections, as the case may be, a statement, containing the details of duty of central excise not levied or paid or short-levied or short-paid or erroneously refunded for the subsequent period, on the person chargeable to duty of central excise, then, service of such statement shall be deemed to be service of notice on such person under the aforesaid sub-section (1) or sub-section (3) or sub-section (4), subject to the condition that the grounds relied upon for the subsequent period are the same as are mentioned in the earlier notice or notices.

(8) Where the service of notice is stayed by an order of a court or tribunal, the period of such stay shall be excluded in computing the period of two years referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), as the case may be.

(9) Where any appellate authority or tribunal or court concludes that the notice issued under sub-section (4) is not sustainable for the reason that the charges of fraud or collusion or any wilful mis-statement 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 has not been established against the person to whom the notice was issued, the Central Excise Officer shall determine the duty of excise payable by such person for the period of two years, deeming as if the notice were issued under clause (a) of sub-section (1).

(10) The Central Excise Officer shall, after allowing the concerned person an opportunity of being heard, and after considering the representation, if any, made by such person, determine the amount of duty of excise due from such person not being in excess of the amount specified in the notice.

(11) The Central Excise Officer shall determine the amount of duty of excise under sub-section (10)—

(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);

(b) within two years from the date of notice, where it is possible to do so, in respect of cases falling under sub-section (4).

(12) Where the appellate authority or tribunal or court modifies the amount of duty of excise determined by the Central Excise Officer under sub-section (10), then the amount of penalties and interest under this section shall stand modified accordingly, taking into account the amount of duty of excise so modified.

(13) Where the amount as modified by the appellate authority or tribunal or court is more than the amount determined under sub-section (10) by the Central Excise Officer, the time within which the interest or penalty is payable under this Act shall be counted from the date of the order of the appellate authority or tribunal or court in respect of such increased amount.

(14) Where an order determining the duty of excise is passed by the Central Excise Officer under this section, the person liable to pay the said duty of excise shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.

(15) The provisions of sub-sections (1) to (14) shall apply, *mutatis mutandis*, to the recovery of interest where interest payable has not been paid or part paid or erroneously refunded.

(16) The provisions of this section shall not apply to a case where the liability of duty not paid or short-paid is self-assessed and declared as duty payable by the assessee in the periodic returns filed by him, and in such case, recovery of non-payment or short-payment of duty shall be made in such manner as may be prescribed.

Explanation 1.— For the purposes of this section and Section 11AC,—
(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,—

(i) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid, and no periodical return as required by the provisions of this Act has been filed, the last date on which such return is required to be filed under this Act and the rules made thereunder;

(ii) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid and the return has been filed the date on which such return has been filed;

(iii) in any other case, the date on which duty of excise is required to be paid under this Act or the rules made thereunder;

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

(v) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund;

(vi) in the case where only interest is to be recovered, the date of payment of duty to which such interest relates.

(c) Omitted by Act 20 of 2015, sec. 93(iii)(C) (w.e.f. 14-5-2015).

> *Explanation 2.*— For the removal of doubts, it is hereby declared that any non-levy, short-levy, non-payment, short-payment or erroneous refund where no show cause notice has been issued before the date on which the Finance Bill, 2015 receives the assent of the President, shall be governed by the provisions of Section 11A as amended by the Finance Act, 2015."

A plain reading of section 11A, as quoted hereinabove, reveals that it makes a distinction between the cases of duties of excise not having been levied, paid, short-paid or short-levied, erroneously refunded, for reasons of fraud, collusion or any mis-statement or suppression of facts or contravention of any provisions of the Act or Rules made with the intent to evade payment of duty and in cases where none of these elements are present, under sub-section (1) of section 11A of the Act of 1944, where any such duty of excise has not been levied or short-levied or erroneously refunded for any reason other than the reasons of fraud or collusion, etc., the Central Excise Officer would, within two 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 authorises 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.

The learned Tribunal took notice of the above position in law while going on to observe that when the Excise Officer passed the order of refund, he was applying the law laid down by the Hon'ble Supreme Court by virtue of Article 142 of the Constitution of India. The learned Tribunal proceeded to observe to the effect that the Excise Officer had no other choice but to follow the decision of the Hon'ble Supreme Court in *M/s SRD Nutrients* (supra). Any other action on his part would have been wholly illegal. His order of refund thus was in consonance with the law declared by the Hon'ble Supreme Court at the time when he was passing the order. The learned Tribunal proceeded further to observe that in its view any subsequent change in the legal position would not permit him to invoke the powers of section 11A of the Act of 1944. As is well settled, all legal

proceedings on the date when are being decided by any Court, would be governed by the law laid down by the Hon'ble Supreme Court which prevails on such date.

A significant part of the order of the learned Tribunal is quoted hereinbelow:—

> "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."

In this backdrop if one were to accept the submissions advanced by the learned Deputy Solicitor General of India, then all judgments rendered by all competent Courts — following judicial precedents laid down by the Hon'ble Supreme Court holding the field at that material point of time — would be set to naught if at a subsequent stage those judicial precedents are overruled by subsequent decisions of the Hon'ble Supreme Court. A total chaos would result and no *lis* would assume finality. This very fundamental principle was taken into consideration by the Hon'ble Supreme Court of India in a judgment and order dated 04th July, 2023, rendered in the case of *Commissioner of CGST and Central Excise (J&K) vs. M/s Saraswati Agro Chemicals Pvt. Ltd.* (Special Leave Petition (Civil) Diary No(s). 18051/2023). Relevant portion of the judgment and order dated 04th July, 2023, rendered by the Hon'ble Supreme Court of India, is quoted hereinbelow: -

> "With regard to the reference order made on 27.09.2021 on a miscellaneous application filed by the Revenue seeking to undo the judgment in M/s SRD Nutrients (P) Limited which was overruled in the subsequent judgment of this Court in ***M/s Unicorn Industries*** (supra), the question is whether there was a need at all to refer the matter to a

larger Bench. This is for two reasons: firstly, such an application could not have been filed after a review petition in M/s SRD Nutrients (P) Limited had been dismissed by this Court. Thus, in substance, by filing the miscellaneous application the revenue was seeking a second review of the said judgment which is impermissible in law (Order XLVII Rule 9 CPC). Secondly, by ignoring the Explanation to Order XLVII Rule 1 of the CPC and the principle that emerges from the same, what is sought to be contended by learned ASG is that if a judgment is overruled by this Court by a subsequent judgment, then the overruled judgment will have to be reopened and on reopening the said judgment will have to be brought in line with the subsequent judgment which had overruled it. This is not permissible in law for two reasons: firstly, there has to be finality in litigation and that is in the interest of State. Secondly, a person cannot be vexed twice. This is epitomized by the following maxims:

(i) Nemo debet bis vexari pro una et eadem causa (No man should be vexed twice for the same cause);

(ii)Interest reipublicae ut sit finis litium (It is in the interest of the State that there should be an end to litigation); and

(iii)Res judicata pro veritate occipitur (A judicial decision must be accepted as correct).

These maxims would indicate that there must be an end to litigation otherwise the rights of persons would be in an endless confusion and fluid and justice would suffer.

That is why the explanation to Order XLVII Rule 1 which is a wholesome provision has been inserted to the Code of Civil Procedure. It states that once there is a subsequent judgment overruling an earlier judgment on a point of law, the earlier judgment cannot be reopened or reviewed on the basis of a subsequent judgment.

The contention of the Revenue is that in view of the subsequent judgment of this Court in M/s Unicorn Industries, recoveries could be made from the assessees with regard to the refund of education cess made by the Department or if not paid by the assesses following the judgment in SRD Nutrients (P) Limited. In the above circumstances, appeals were filed before the High Court by the assessees. In the instant case, the High Court had raised the following question of law and answered it against the Revenue:-

> "***Whether the assessee is liable to return the Education Cess and Secondary & Higher Education Cess on the changed view of law as subsequently laid down by the Full Bench of the Supreme Court in Unicorn Industries vs. Union of India reported in (2020) 3 SCC 492, overruling SRD Nutrients (P) Ltd. vs. CCE (Supra) on the basis of which the aforesaid cess was refunded to the Assessee.***"

In our view the High Court has rightly answered the aforesaid question. The High Court in the impugned order while considering the judgment passed by this Court in SRD Nutrients (P) Limited (supra) as well as in M/s Unicorn Industries (supra) has observed in Paragraph 74 as under:

> "***Applying the aforesaid principle in the cases at hand, since the assessee has been held entitled to the refund of the Educational cess and Secondary & Higher Educational cess on the basis of a judgment and order of the Supreme Court in case SRD Nutrients which was in vogue at the relevant time, the appellants are not entitled to make recovery of the said refunded amount on the basis of the subsequent decision of the Supreme Court rendered in the case of Unicorn Industries. If such an action is permitted, it will open a Pandora box and***

> ***the lis between the parties which had attained finality will never come to an end. This would be against the public policy which envisages providing quietus to litigation at some stage.***"
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> In substance, the High Court has stated that the decision in SRD Nutrients (P) Limited (supra) had attained finality and was binding on the parties thereto. Therefore, the subsequent decision of this Court overruling SRD Nutrients (P) Limited (supra) in the case of M/s Unicorn Industries cannot have a bearing on past decisions which had attained finality although they had followed SRD Nutrients (P) Limited (supra), which was subsequently overruled in M/s Unicorn Industries. Otherwise a pandora's box would be opened and there would be no end to litigation, which is against public policy.
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> That is exactly what is sought to be done by the reference order dated 27.09.2021. When we read the reference order in light of the what has been discussed, we find that the reference order was unnecessary.
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> In the circumstances, the Special Leave Petitions are dismissed."

The above position of law laid down by the Hon'ble Supreme Court clears the issue sought to be raised in the present statutory appeal and for reasons stated above, we have no hesitation in dismissing the instant appeal.

Before we part with this matter, in our view, this statutory appeal is a classic example of an instance where precious and valuable time of the Court is lost because of the appellant choosing not to follow the law laid down by the Hon'ble Supreme Court which governs the field. The ratio of the decision rendered by the Hon'ble Supreme Court in the case of *Commissioner of CGST and Central Excise (J and K) vs. M/s Saraswati Agro Chemicals Pvt. Ltd.* (supra) rendered on 04th July, 2023, is squarely applicable in the facts of the instant case. Even then, this statutory appeal was filed by the Commissioner of Central Goods and Services Tax and Central Excise, Siliguri Commissionerate on 20th May, 2024. On that date (i.e. on 20th May, 2024), the judgment of the Hon'ble Supreme Court dated 04th July, 2023, was squarely governing the field. This important aspect of the matter should have been taken into consideration by the Commissioner of Central Goods and Services Tax and Central Excise, Siliguri Commissionerate, being the appellant before us. Instead, ignoring the said decision of the Hon'ble Supreme Court, a frivolous appeal has been filed. We, therefore, find that this is a fit case for imposition of cost upon the appellant. As such, this Court imposes a cost of Rs.20,000/- (Rupees twenty thousand only)

upon the appellant which shall be deposited with the Sikkim State Legal Services Authority within a fortnight from date.

At this stage, the learned Deputy Solicitor General of India prays before this Court that the appellant may be exempted for payment of cost on the assurance that in future any such frivolous appeal — which takes away the valuable and precious time of the Court — without considering the relevant judgment of the Hon'ble Supreme Court holding/governing the field, will not be filed by the appellant.

Considering the above submission made by the learned Deputy Solicitor General of India, we refrain from imposing cost upon the appellant.

(Meenakshi Madan Rai)
Judge

(Biswanath Somadder)
Chief Justice

jk/ds/avi/ami